90-273

No. _____

In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
and PROGRESSIVE FARMER, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPEME COURT OF THE STATE OF TENNESSEE

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QUESTION PRESENTED

Whether the Equal Protection Clause and the First Amendment require that state tax and exemption statutes providing content-neutral distinctions between different segments of the communications media, such as between newspapers and magazines, must satisfy strict scrutiny.

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee in *Newsweek, Inc. v. Kathryn Behm Celauro, Commissioner of Revenue, State of Tennessee,* filed March 5, 1990, is reported at 789 S.W.2d 247, and is reprinted as Appendix A.

The opinion of the Supreme Court of Tennessee in *Southern Living, Inc., Progressive Farmer, Inc. v. Kathryn Behm Celauro, Commissioner of Revenue, State of Tennessee,* filed March 5, 1990, is reported at 789 S.W.2d 251, and is reprinted as Appendix B.

The unpublished memorandum opinion of the Chancery Court for the State of Tennessee, 20th Judicial District, in the *Newsweek, Inc.* case was filed April 22, 1988, and is reprinted as Appendix C. The unpublished supplemental memorandum opinion of the Chancery Court in that case, filed June 1, 1988, is reprinted as Appendix D.

The unpublished memorandum opinion of the Chancery Court for the State of Tennessee, 20th Judicial District, in the *Southern Living, Inc., Progressive Farmer, Inc.* case was filed April 22, 1988, and is reprinted as Appendix E. The unpublished supplemental memorandum opinion of the Chancery Court in that case, filed June 1, 1988, is reprinted as Appendix F.

JURISDICTION

This petition seeks review of judgments of the Supreme Court of Tennessee which were entered March 5, 1990. Timely petitions for rehearing were denied by the Tennessee Supreme Court by orders entered on May 14, 1990. (Appendices G and H). This petition is filed within 90 days of those denials of rehearing, pursuant to 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.4.

The jurisdiction of this Court to review the judgments of the Supreme Court of Tennessee is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. Amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tenn. Code Ann. § 67-6-329(a):

> The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter:
>
> . . .
>
> (3) Newspapers.

A regulation involved in this case, Tenn. Admin. Comp. 1320-5-1-.46, is reproduced as Appendix I, pursuant to U.S. Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Newsweek, Inc., Southern Living, Inc., and Progressive Farmer, Inc., brought suit to recover use tax, interest, and penalty paid to the Tennessee Department of Revenue. The Department had assessed use tax deficiencies on the plaintiffs' sales of magazine subscriptions to Tennessee residents.

The primary business of Newsweek, Inc., is to publish and sell *Newsweek* magazine, a weekly publication containing articles on various topics, including reports of recent news events. Southern Living, Inc.'s, primary business is also to publish and sell magazines, including *Southern Living* and *Creative Ideas for Living*, monthly publications with articles relating to life in the southern region of the United States. Similarly, Progressive Farmer, Inc., publishes and sells *Progressive Farmer*, a monthly publication containing articles relating to farming, agriculture, and rural life.

The three publishers each brought suit separately, challenging the Tennessee sales and use tax system under which newspapers are exempt but the sales of the plaintiffs' publications are taxed. Tennessee's sales and use tax laws, Tenn. Code Ann. §§ 67-6-101 *et seq.*, generally tax all sales or uses of tangible personal property in the state. Tenn. Code Ann. § 67-6-329(a)(3) specifically exempts "newspapers" from the tax, but the statute does not define that term. Because no specific exemption applies to magazines (other than publications sold to or by or used by religious and charitable organizations, exempt under Tenn. Code Ann. § 67-6-323), publications other than newspapers are subject to the generally applicable sales and use tax. An administrative regulation, Tenn. Admin. Comp. 1320-5-1-.46(2), provides that a "newspaper" must possess "at least" certain enumerated characteristics. (App. I).

The publishers raised the constitutional issues in their complaints at the trial court level. Among other issues raised, the publishers alleged that the distinction drawn between newspapers and other publications for

tax exemption purposes violates the free speech and free press clauses of the First Amendment, and the due process and equal protection clauses of the Fourteenth Amendment. (*Newsweek* Memo., App. C at 16, 21-3; *Southern Living* Memo., App. E at 30, 35-6).

The *Southern Living* and *Progressive Farmer* cases were consolidated by the trial court, the Chancery Court for the State of Tennessee, 20th Judicial District, Davidson County. Although the *Newsweek* case was not formally consolidated with the others, the cases were tried concurrently.

Addressing the constitutional issues, the Chancery Court ruled that Tennessee's newspaper exemption, Tenn. Code Ann. § 67-6-329(a)(3), was narrowly drawn; although all newspapers are exempt, nearly all other publications are taxed. Therefore, the Chancery Court found that "[t]he State has not singled out a small group of magazines for taxation." The court found that the newspaper exemption was supported by the state interest in reducing regulation of the press. Finally, the Chancery Court ruled that the determination to exempt newspapers, but not other periodicals, from taxation offended neither the First Amendment nor the Fourteenth Amendment. (*Newsweek* Memo., App. C. at 21-3; *Southern Living* Memo., App. E at 35-6).

On direct appeal, the Supreme Court of Tennessee reversed. Focusing on the administrative regulation, rather than on the taxing and exemption statutes themselves, or the common understanding of the word "newspaper," the court opined that Tennessee's distinction between newspapers and other publications was content-

based. The court also ruled, contrary to the Chancery Court's findings, that the distinction "singles out the press" or "targets individual publications within the press." Then, the court applied strict scrutiny analysis. (*Newsweek* Opin., App. A at 8; *Southern Living* Opin., App. B at 14). Finding no "compelling justification" for the distinction between newspapers and other publications, the court ruled that the tax on non-newspaper publications "is invalid under the First Amendment." (*Newsweek* Opin., App. A at 8).

REASONS FOR GRANTING THE WRIT

WHETHER STATE TAX STATUTES DISTINGUISHING BETWEEN DIFFERENT SEGMENTS OF THE COMMUNICATIONS MEDIA MUST SATISFY STRICT SCRUTINY ANALYSIS IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN AND NEEDS TO BE SETTLED BY THIS COURT.

The Tennessee Supreme Court's decisions invalidating on First Amendment grounds the statutory distinction, for sales and use tax exemption purposes, between newspapers and other publications present constitutional issues of far-ranging national importance which have not been, but should be, decided by this Court. Many states have sales and use tax laws which distinguish between types of publications for tax exemption purposes.[1] Most

[1] Various types of distinctions between publications are found in the statutes or rules of approximately 35 jurisdictions, including Tennessee. *See* Ala. Admin. Code r.810-6-1-.110; Cal. Rev. & Tax Code § 6362(a); Colo. Rev. Stat. § 24-70-102; Conn.

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important, the Tennessee Supreme Court's misapplication of First Amendment and equal protection principles severely curtails the necessary flexibility of state legislatures to design rational systems of taxation and

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Gen. Stat. § 12-412(4)(A) & (B); D.C. Code Ann. § 47-2005(6); Haw. Rev. Stat. § 14-238-1; Idaho Code §§ 63-3622I and 63-3622L; Ind. Code § 6-2.5-5-17, Ind. Admin. Code tit. 2.2-5-26, r.45; Iowa Code § 422.45(9), Iowa Admin. Code r.701-16.43; 103 Ky. Admin. Regs. 27:140; Md. Tax-Gen. Code Ann. § 11-215(c)(1)-(3), Md. Regs. Code tit. 03.06.01.05; Mich. Comp. Laws § 205.54a(h); Minn. Stat. § 297A.25 (subd. 1)(i), Minn. R. 8130.5600 (subp. 2); Miss Code Ann. § 27-65-111(b); Mo. Rev. Stat. § 144.030(7), Mo. Code Regs. tit. 12, §§ 10-3.112 and 10-3.114(1); Neb. Rev. Stat. § 77-2704(1)(d) & (n); Nev. Rev. Stat. § 372.315, Nev. Admin. Code, ch. 372, § 620; N.M. Stat. Ann. § 7-9-63; N.C. Gen. Stat. § 105-164.13(28); N.D. Cent. Code § 57-40.2-01(8)(c); Ohio Rev. Code Ann. § 5739.02(B)(4); Okla. Stat. tit. 68, § 1357(c); 1971 Pa. Laws 2, § 204(30); R.I. Gen. Laws § 44-18-30(B); S.C. Code Ann. § 12-35-550(7), S.C. Code Regs. 117-174.166; S.D. Admin. R. 64:06:03:33; Tex. Rev. Civ. Stat. Ann. §§ 151.319(a) and 151.320(a); Utah Code Ann. § 59-12-104(19), Utah Admin. R. 865-65S; Vt. Stat. Ann. tit. 32, § 9741(15); Va. Code Ann. § 58.1-608(6)(c); Wash. Rev. Code § 82.08.0253, Wash. Admin. Code §§ 458-20-127(1) & (2) and 458-20-143; W.Va. Code § 11-15-9(m); Wis. Stat. § 77.54(15); Wyo. Stat. § 39-6-405(a)(xxi), Wyo. Sales Tax Rules, § 39.

Florida's distinction between newspapers and magazines (Fla. Stat. §§ 212.05(e)(3)(i) and 212.08(7)(w); Fla. Admin. Code r.12A-1.008) was recently invalidated by the Florida Supreme Court in an opinion relying in part on the Tennessee decisions challenged here. *Dept. of Revenue v. Magazine Publishers of America, Inc.*, No. 75,201, 1990 WestLaw 74586 (Fla., May 31, 1990).

exemption,[2] and to create reasonable classifications in other areas of the law. This Court should take this opportunity to clarify the equal protection analysis required when state laws draw distinctions between different segments of the press.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), this Court expressly declined to decide the issue presented by these cases: whether state sales and use tax laws can constitutionally distinguish between different types of periodicals, such as between newspapers and magazines. 481 U.S. at 233. In *Arkansas Writers' Project*, this Court's holding that content-based distinctions between magazines were constitutionally impermissible was sufficient to invalidate the tax assessed upon the plaintiff-publisher. Thus, this Court was not required to reach, and the Court left open, the

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[2] If left standing, the decisions here would cause Tennessee state and local governments significant losses of critically needed revenues. Presumably, comparable or greater revenue losses would be suffered by many other states across the nation. Nearly $6 million in refunds are sought by the taxpayers in the present cases, and in companion cases held in abeyance by the trial court pending these cases. The Tennessee Department of Revenue conservatively estimates that Tennessee would derive at least $2.7 million per year in state and local revenue from taxation of magazine subscriptions. These estimates do not include the untold millions of dollars in revenue from over-the-counter sales of magazines, because such sales are not reported separately but are included in the gross sales returns of newsstands, drug stores, supermarkets, and other retail outlets, and thus are very difficult to quantify. The Tennessee Supreme Court's decisions would invalidate the sales tax on over-the-counter sales, as well as the use tax on subscription sales.

question whether state tax laws could distinguish between different types of periodicals. *Id. See also Medlock v. Pledger*, 785 S.W.2d 202, 204 (Ark. 1990), petitions for cert. filed July 2, 1990 (Nos. 90-29 and 90-38), in which the court noted the reservation in *Arkansas Writers' Project*, and expressed unwillingness to hold "that all mass communications media must be taxed in the same way." The question reserved in *Arkansas Writers' Project* is squarely raised by the present cases, which offer the opportunity to determine the scope of the government's ability to distinguish between the various types of businesses which compose the communications media.

The Tennessee Supreme Court's opinions in the present cases hold that any and all distinctions drawn by a state legislature, for tax purposes, between different segments of the press are unconstitutional unless supported by some "compelling governmental interest." Of course, such "strict scrutiny" imposes a very heavy burden upon challenged statutes. Of much wider significance, the court's broadly written opinions may be understood as holding that if any form of expression embraced by the First Amendment is exempt from taxation, or receives some other benefit from the state, then all forms of protected expression must be allowed the same tax exemption or other benefits. In essence, the Tennessee Supreme Court's decisions not only would require absolutely uniform treatment of newspapers and magazines, but also suggest that forms of expression as varied as books, sound recordings, video tapes, motion pictures, advertising materials, and other forms of communication should be treated exactly the same as newspapers.

The state court decisions in these cases seriously erode the base of sales and use tax systems, and deprive state and local governments of desperately needed revenues. Further, the Tennessee Supreme Court's opinions contradict the widely held and logical view that newspapers have historically served, and continue to serve, some important public purpose separate and different from the functions of magazines and other forms of expression. Much more, the Tennessee Court's decisions here ignore the practical reality that the press comprises different types of business operations, which may be rationally divided into classifications, and that such classifications are not per se based on content or viewpoint. Indeed, in the court below, the Commissioner argued that Tennessee's statutory distinction between newspapers and magazines can and should be construed as content-neutral. A distinction between newspapers and magazines based upon the differing production, marketing, and distribution operations of the respective publishing businesses, and upon the physical character, format, and "shelf-life" of their products, would not refer to the content, much less the viewpoint, of the publications themselves.

Surely, state legislatures must and do have sufficient flexibility, within our constitutional framework, to design rational systems of taxation and to create reasonable classifications of taxable and nontaxable subjects, even among those business enterprises which operate within the sphere of the First Amendment. So long as such legislative classifications are not defined in terms of the content of forms of expression, and so long as protected expression is not coerced, censored, or unfairly burdened,

rational distinctions may be drawn between various forms of expression without offending the First Amendment or equal protection principles. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983).

In *Taxation With Representation*, a lobbying group raised First Amendment and equal protection challenges against Internal Revenue Code provisions which denied the plaintiff the ability to receive tax-deductible contributions for its lobbying activities, even though other lobbying organizations were allowed tax-deductible contributions. *Id.*, 461 U.S. at 542-3. This Court recognized that tax exemptions and tax deductibility are forms of subsidies administered through the tax system. *Id.*, 461 U.S. at 544. This Court, however, again squarely rejected the notion that First Amendment rights are impaired if not subsidized by the government. *Id.*, 461 U.S. at 546, *citing Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). A legislature's decision not to subsidize the exercise of First Amendment rights does not infringe those rights. *Taxation With Representation*, 461 U.S. at 549. *See also Arkansas Writers' Project*, 481 U.S. at 236 (Scalia, J., dissenting).

Also, in *Taxation With Representation*, this Court recognized that distinctions in tax statutes are to be evaluated according to the "rational basis" standard of equal protection analysis, even in cases involving First Amendment interests, unless the statutes suppress expression or employ suspect classifications such as race or national origin. *Id.*, 461 U.S. at 548. The Court noted its long line of decisions holding that legislatures have "especially broad latitude in creating classifications and distinctions in tax

statutes." *Id.*, 461 U.S. at 547. Further, this Court reiterated that

> the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Id., 461 U.S. at 547-8, *quoting Madden v. Kentucky*, 309 U.S. 83, 87-8 (1940).

Thus, this Court has clearly rejected the argument that strict scrutiny (i.e., the "compelling governmental interest" test) applies whenever the government subsidizes some speech but not all speech. *Taxation With Representation*, 461 U.S. at 548. Strict scrutiny applies to a statute challenged on First Amendment grounds only if the statute "was intended to suppress any ideas or . . . had that effect," or if the statute discriminates on the basis of a suspect classification such as race or national origin. *Id.*

Notwithstanding the clear directives of this Court's *Taxation With Representation* holding regarding the levels of scrutiny applicable to statutes challenged on First Amendment grounds, the Tennessee Supreme Court said that the *Taxation With Representation* case "has little or nothing to do with the abridgment of freedom of speech, or of the press contained in the First Amendment to the Constitution." (*Southern Living*, Opin., App. B at 12). The Tennessee Supreme Court thus completely and erroneously denied the applicability of the *Taxation With Representation* decision to the present cases. By so doing, the

state court placed itself in direct conflict with the unanimous decision of this Court in *Taxation With Representation.*

In the present cases, the parties stipulated that *Newsweek* magazine satisfied all of the criteria, set forth in Tenn. Admin. Comp. 1320-5-1-.46(2), describing tax-exempt newspapers, satisfying even those criteria described by the court below as "content-based." Therefore, the trait which distinguishes the magazines in these cases from tax-exempt newspapers is not the allegedly content-based element of the regulation, but rather the fact that the magazines do not fit the natural, common, and traditional sense of the word "newspaper." (*See Newsweek* Memo., App. C at 21). Clearly, the failure of magazines to fall within the natural, plain and ordinary understanding of the word "newspaper" is not necessarily based upon the content of the different types of publications.

Further, there was no evidence in these cases that Tennessee's sales and use tax laws had the effect of coercing, censoring, or suppressing any expression of ideas. Nor was there any evidence that the challenged tax system "singles out" the press for unique tax treatment, or targets individual publications within the press for special tax burdens, factors which triggered strict scrutiny in *Arkansas Writers' Project* and in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).

In *Minneapolis Star,* the challenged tax was not, as it is here, a generally applicable sales and use tax, but rather a special tax aimed exclusively at paper and ink

products consumed in producing publications. *Minneapolis Star*, 460 U.S. at 577, 581. Even worse, the tax applied to only 14 out of a total of 388 newspapers in Minnesota. *Id.*, 460 U.S. at 578. In *Arkansas Writers' Project*, the practical effect of the Arkansas tax scheme was that at most only three publications were subject to tax, while all others were exempt. *Arkansas Writers' Project*, 481 U.S. at 229, n.4. Thus, strict scrutiny was appropriate in those cases.

Tennessee's sales and use tax, however, applies generally to all retail sales and uses of tangible personal property, with limited exemptions. Tennessee's tax does not single out the press, or target a limited number of publishers, but generally treats the publishing industry the same as other businesses. Nonetheless, the Tennessee Supreme Court hastened to the conclusion that strict scrutiny was the appropriate level of analysis whenever a state law distinguishes between the different segments of the press.

By so misconstruing the holdings of *Arkansas Writers' Project* and *Minneapolis Star*, and by categorically denying the applicability of this Court's reasoning in *Taxation With Representation*, the Tennessee Supreme Court's decisions would unduly expose state laws to probable invalidation under the burdensome strict scrutiny standard. State tax laws and other laws which create classifications among the different businesses within the press would be invalidated, even where the classifications are not necessarily based on content and do not suppress, coerce, censor, or impair freedom of expression.

In effect, the Tennessee Supreme Court has fashioned a rule whereby any state law distinctions between taxpayers involved in the communications media are per se subject to strict scrutiny. The analysis employed by the Tennessee court contradicts the reasoning of this Court in pertinent cases. The conclusion reached by the Tennessee court goes far beyond the prior decisions of this Court, and into an area expressly left unsettled by this Court. The proper application of equal protection principles to the competing interests of the states in creating rational systems of taxation and of taxpayers demanding subsidization for First Amendment activities is an issue of national importance which should be settled by this Court.

CONCLUSION

For the reasons set forth above, the petitioner respectfully submits that this petition should be granted, and a writ of certiorari issue to review the decisions of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

NEWSWEEK, INC. Plaintiff/Appellant, v. KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE, Defendant/Appellee.	)	FOR PUBLICATION March 5, 1990 DAVIDSON CHANCERY Hon. Irvin H. Kilcrease, Jr., Chancellor S/C No. 88-54-I

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OPINION

REVERSED & REMANDED — O'BRIEN, J.

This suit was instituted for the recovery of sales taxes, penalty and interest paid by the plaintiff under protest. The defendant Commissioner of Revenue assessed a sales and/or use tax on plaintiff's mail order subscription sales during the period 1 January 1982 through 31 December 1984, pursuant to the Retailers' Sales Tax Act, T.C.A. §67-6-201, et seq.

The issues presented for review here are substantially those found by the trial court and ruled upon adversely to the plaintiff. Those issues are:

(1) Is the plaintiff's publication, Newsweek, a "newspaper" within the meaning of the word used in T.C.A. §67-6-329(3) and defined in Department of Revenue Regulation Sec. 1320-5-1-46, and thus exempt from imposition of a sales tax.

(2) If Newsweek is "not a newspaper" does the imposition of a tax on sales of Newsweek as a magazine, denying it the newspaper exemption from the same tax, amount to a violation of plaintiff's constitutional rights in that:

A. It violates plaintiff's constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution;

B. It denies plaintiff's right to due process of law and equal protection under the guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Sec. 8 of the Tennessee Constitution.

(3) Does or not the plaintiff have sufficient nexus with the State of Tennessee to give the State a constitutionally valid jurisdictional basis to impose a sales tax on plaintiff's subscription sales of the Newsweek publication to residents of Tennessee.

(4) Is the imposition of a penalty against the plaintiff under the Tennessee tax law and regulations equitable and should the penalty be abated.

We look initially to the constitutional claims charging violation of plaintiff's first amendment guarantees of freedom of the press and freedom of expression. These claims are dispositive if found against the State.

The trial court held that plaintiff's reliance on the United States Supreme Court decision in *Arkansas Writers' Project, Inc. v. Ragland*, ___ U.S. ___, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) was misplaced. He found that the Arkansas sales tax on tangible personal property, including publications, contained broad exemptions for newspapers and religious, professional, trade and sports journals, and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. It was the chancellor's view that the United States Supreme Court held the State's selective application of its sales tax to magazines to be violative of the First Amendment because the State failed to show that its content-based discrimination was necessary to serve a compelling State interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the State tax. He held that the Tennessee Sales Tax Exemption was more narrowly drawn that in *Ragland*. Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. §67-6-323. He found the State had not singled out a small group of magazines for taxation. The compelling State interest advanced by defendant was to reduce regulations and further freedom of the press, which was a sufficiently compelling State interest to warrant exempting newspapers. He held that the decision to not exempt other periodicals from taxation was not a violation of freedom

of the press or freedom of expression under the First Amendment. We disagree with the trial court's conclusion.

We begin this analysis with the proposition that the First Amendment does not prohibit all regulation of the press. The state and the federal governments may subject newspapers to generally applicable economic regulation, i.e., some form of taxation, without creating constitutional problems. See *Minneapolis Star & Tribune v. Minn., Com'r of Rev.*, 460 U.S. 575, 103 S.Ct. 1365, 1369, 75 L.Ed.2d 295 (1983). However, a tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest, *id.* 103 S.Ct. at 1370. In the *Minneapolis Star* case the Court found that the State had not chosen to apply its general sales and use tax to newspapers generally but instead had created a special tax that applied only to certain publications protected by the First Amendment.

The State concedes that constitutional problems arise with respect to taxation of the press when a State's system of taxation singles out the press for special treatment and poses burdens on the press not applicable to other businesses. They argue that differential treatment of the press, as opposed to other businesses, does not occur under Tennessee Sales & Use Tax Statutes. They note that the plaintiff's grievance in this case is not that the press is singled out for special, burdensome tax treatment, but rather that some portion of the press, specifically newspapers, is afforded a tax exemption while elements of the press, including the plaintiff, are subject to the generally applicable sales and use tax. They assert that generally,

statutory classifications and distinctions are valid if they are rationally related to legitimate governmental purposes.

It is the State's position that Tennessee's exemption of newspapers, while other types of publications are taxed, can be justified as a content-neutral distinction. They begin with the premise that the term "newspaper" can be defined as a function of the methods of a publishing business operation, rather than in terms of the subject matter or viewpoint of a given publication. They then syllogize that if a publication is defined in terms which are not based on content, tax officials need look only to the method of the publisher's business operation to determine whether its publications deliver news and information in a timely and immediate manner. Therefore in order to qualify as a newspaper and thus avoid First Amendment problems, under the principles requiring that statutes be construed so as to uphold their constitutionally, that definition of "newspaper" should be favored and applied to the language of T.C.A. §67-6-329(a)(3). That other types of publications, while serving a useful public interest in disseminating information, may be rationally viewed by a legislature as not providing the immediacy which is needed by the public. Thus a legislature can rationally classify newspapers as nontaxable, and levying the tax on other publications does not interfere with or burden the freedom of the press.

This analysis does not pass muster in light of the requirement that in order to qualify for the newspaper exemption in Tennessee, among other things, a publication "must contain matters of general interest and reports

of current events." Rule 46(2)(d). This is not a content-neutral requirement. As *Arkansas Writer's*, supra, emphasizes, the First Amendment prohibits not only restrictions on particular viewpoints, it extends to prohibition of public discussion in its entirety. 107 S.Ct. at 1726.

In the *Arkansas* case the publisher of a general interest magazine brought suit challenging Arkansas's Sales Tax scheme. Arkansas, as does Tennessee, imposes a tax on receipts from sales of tangible personal property, but exempts numerous items, including newspapers and religious, professional, trade, and sports journals and/or publications printed and published within the State, familiarly known as the "magazine exemption." The Arkansas Supreme Court held that the magazine exemption applied only to religious, professional, trade, or sports periodicals. The United States Supreme Court at 107 S.Ct. 1726-27, citing *Minneapolis Star*, supra at 103 S.Ct. 1371, and *Grosjean v. American Press Company*, 297 U.S. at 2244-245, 56 S.Ct. at 446-447, stated, "our cases clearly establish that a discrimination tax on the press burdens rights protected by the First Amendment. In *Minneapolis Star* the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. . . . Second, the tax targeted a small group of newspapers. . . . Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. . . . This is because selective taxation of the press – either singling out the press as a whole or targeting individual members of the press – poses a particular danger of abuse by the

State. 'A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of tax payers by burdensome taxation if it must impose the same burden on the rest of its constituency.' "

Noting that a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action, the Court held that Arkansas had advanced no compelling justification for selective, content-based taxation of certain magazines. They held the tax invalid under the First Amendment.

The State here argues that the newspaper exemption of T.C.A. §67-6-329(a)(3) furthers a vital public purpose and compelling public interest by providing immediate and timely dissemination of information to the public. At the same time it is argued that computer networks, radio, television and other electronic media help fill this need, but are not normally subject to sales and use tax because their transmissions of information often do not involve transfers of tangible personal property.

In our view, the immediate provision of news is not a compelling governmental interest. There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or

commentary. It is not a legitimate function of the government to decide which information furthers better the public interest. Moreover, the exemption statute is not narrowly tailored to meet the asserted governmental interest. Newsweek publishes as frequently as many exempt newspapers. With the application of current day technology, its "news" is no more stale than that of newspapers publishing weekly.

The trial court found that the purpose in exempting newspapers from taxation was to further freedom of the press and to reduce regulation in the area of the press and held that to be a sufficiently compelling State interest to warrant the exemption. The State does not defend those issues here but relies on its argument that the Tennessee Sale & Use Tax system withstands constitutional challenge because it is rationally related to the promotion of vital and compelling public interest and Tennessee's distinction between newspapers and other publications is not based upon content, but can be defined and justified as content-neutral.

The tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. *Minneapolis Star*, supra, 1376. In this case the State has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of plaintiff's publication. We hold therefore the tax is invalid under the First Amendment.

The chancellor also ruled on the issue of whether a tax on plaintiff's non-religious publications while exempting certain religious publications from taxation is

an unconstitutional establishment of religion. That issue is neither presented nor argued here and thus we consider it pretermitted, as well as other issues have been pretermitted by our finding that the Tennessee tax scheme is invalid as it applies to this plaintiff. Nonetheless we believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890, ___ L.Ed.2d ___ (1989).

The judgment of the trial court is reversed. The case is remanded for such other and further proceedings as may be required. The costs on this appeal are assessed against the defendant.

/s/ Charles H. O'Brien,
CHARLES H. O'BRIEN,
JUSTICE

Drowota, C.J.
Fones & Harbison, JJ.
Cornelius, S.J.

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

SOUTHERN LIVING, INC., PROGRESSIVE FARMER, INC.,	FOR PUBLICATION
	March 5, 1990
Plaintiffs/Appellants,	DAVIDSON CHANCERY
v.	Hon. Irvin H. Kilcrease, Jr., Chancellor
KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	S/C No. 88-53-I
Defendant/Appellee.	

FOR APPELLANTS:

Charles A. Trost
WALLER, LANSDEN, DORTCH & DAVIS
Nashville, Tennessee

FOR APPELLEES:

Charles W. Burson
Attorney General & Reporter

Daryl J. Brand
Assistant Attorney General
Nashville, Tennessee

OPINION

REVERSED & REMANDED

O'BRIEN, J.

This suit was instituted for the recovery of sales taxes, penalty and interest paid by the plaintiffs under protest. It involves substantially the same facts and circumstances contained in *Newsweek, Inc. v. Commissioner of Revenue,* which is released contemporaneously with this cause of action. The Commissioner assessed a sales and/or use tax on plaintiffs' mail order subscription sales in

the State of Tennessee for the years 1985 through September 1987, pursuant to the Retailers Sales Tax Act, T.C.A. § 67-6-201, *et seq.*

The issues presented for review are summarized as follows:

> (1) Did the plaintiffs have a sufficient nexus with the State of Tennessee to warrant imposition of a sales tax on mail order subscription sales of their publications, Southern Living, Creative Ideas for Living and Progressive Farmer to residents of Tennessee?
>
> (2) If the foregoing publications are not "newspapers" does the imposition of a tax on the sales of these publications as magazines, periodicals or publications, denying it the newspaper exemption from the same tax, amount to a violation of plaintiffs' constitutional rights in that:
>
> > (a) It violates plaintiffs' constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution;
> >
> > (b) It denies plaintiffs' right to due process of law and equal protection under the guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Sec. 8 of the Tennessee Constitution.
>
> (3) Is the imposition of the sales tax on sales of plaintiffs' non-religious publications, while allowing an exemption from taxation on the sale, use or distribution of religious publications to or by churches or charitable institutions, not an unconstitutional establishment of religion and religious discrimination in violation of the First and Fourteenth Amendments to the United

States Constitution and Article I, Sec. 3 and Article XI, Sec. 8 of the Tennessee Constitution?

(4) Is the imposition of a penalty against the plaintiffs under the Tennessee tax law and regulations equitable and should the penalty be abated?

We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution.

In addressing plaintiffs' First Amendment claim of infringement on the constitutional guarantee of freedom of speech and the press the State relies almost wholly on the United States Supreme Court decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). This case was a suit brought by the Taxation With Representation organization in federal court seeking a declaratory judgment that it qualified for exemption granted by the Internal Revenue Department to certain charitable and religious organizations under the Internal Revenue Code. That case has little or nothing to do with the abridgement of freedom of speech, or of the press contained in the First Amendment to the Constitution, which is the thrust of the complaint in this suit. It is indisputable that a tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 1370, 75 L.Ed.2d 295 (1983).

In response to that verity, the State says that differential treatment of the press, as opposed to other businesses, does not occur under Tennessee Sales and Use Tax statutes. The Tennessee and Use Tax applies generally to everyone engaged in the business of selling tangible personal property at retail in Tennessee, or who uses or consumes such property in the State, citing T.C.A. § 67-6-201. They state correctly that plaintiffs' grievance is that newspapers in this State are afforded a tax exemption while other elements of the press, including the plaintiffs' publications, are subject to the generally applicable sales and use tax. In support of its contention the State says that Tennessee's exemption of newspapers, while other types of publications are taxed, can be justified as a content-neutral distinction, citing as authority a California Court of Appeals libel suit in which the court engaged in a semantical discussion of the definition of a newspaper in contemplation of California's libel and slander statutes. Utilizing this classification the State insists that the "newspaper" exemption of T.C.A. § 67-6-329(a)(3) is revealed as furthering a vital public interest: "The immediate and timely dissemination of information to the public."

We responded fully to this assertion in the *Newsweek* case, and concluded that in our view, the immediate provision of news is not a compelling governmental interest. There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or commentary. It is not a

legitimate function of the government to decide which form of information furthers better the public interest. Moreover, the exemption statute is not narrowly tailored to meet the asserted governmental interest. The tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. *Minneapolis Star*, supra, 1376. In this case the State has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of plaintiffs' publications.

We have not addressed the constitutional issues under the free-press provisions of the Tennessee Constitution because we have previously expressed the opinion that the Tennessee Constitutional provision assuring protection of speech and press, Tennessee Constitution Article I, Sec. 19, should be construed to have a scope at least as broad as that afforded those freedoms by the First Amendment of the United States Constitution. *Leech v. American Book Sellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979).

The appellants present the issue here, ruled upon adversely to them in the trial court, of whether a tax on their non-religious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion. We consider that issue pretermitted, as well as other issues have been pretermitted, by our finding that the Tennessee tax scheme is invalid as it applies to these plaintiffs. Nonetheless, we subscribe to the view stated by the United States Supreme Court in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890, ___ L.Ed.2d ___ (1989), at p. 896, "It is not for us to decide whether the correct response as a matter of

State law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." That is a legislative function.

The judgment of the trial court is reversed. The case is remanded for such other and further proceedings as may be required. The costs on this appeal are assessed against the defendant.

/s/ Charles H. O'Brien
CHARLES H. O'BRIEN,
JUSTICE

CONCUR:
Drowota, C.J.
Fones, Cooper & Harbison, JJ.

APPENDIX C

NEWSWEEK, INC.	) IN THE CHANCERY
VS. NO. 86-1250-II(I)	) COURT FOR THE STATE
KATHRYN BEHM CELAURO	) OF TENNESSEE 20TH
	) JUDICIAL DISTRICT
	) DAVIDSON COUNTY,
	) PART ONE
	) FILED APR 22 1988

MEMORANDUM

This case was brought for the recovery of sales taxes, penalty and interest paid by the plaintiff under protest. Defendant Commissioner of Revenue has assessed a sales and/or use tax on plaintiff's mail-order subscription sales in Tennessee pursuant to the Retailers' Sales Tax Act, T.C.A. § 67-6-201, *et seq.*, for the years 1985 through the present.

The plaintiffs raise the following five issues:* 1) whether plaintiffs have a sufficient nexus with Tennessee to give the State a constitutional basis upon which to impose the sales tax; 2) whether plaintiff's publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3); 3) if plaintiff's publications are not exempt as newspapers, whether a tax on plaintiff's publications violates plaintiff's constitutional rights under the United States' and Tennessee Constitutions; 4) whether the taxation of non-religious publications such as plaintiff's,

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*Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiff in its complaint. Since these issues were not presented in plaintiff's brief, the Court will consider them waived.

while exempting certain religious publications from taxation, violates the United States' and Tennessee Constitutions; and 5) whether plaintiff's publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

Findings of Fact

The facts of this case were stipulated by the parties. The Court adopts all of the facts which are set forth in stipulation; however, for purposes of brevity all of the facts will not be recited here.

Plaintiff Newsweek, Inc. is a New York corporation with its principal place of business in New York City. It publishes *Newsweek*, a news periodical distributed weekly. The State assessed tax deficiencies for sales taxes alleged to be due for mail-order subscription sales of plaintiff's publication to Tennessee residents.

Plaintiff has no office in Tennessee. From 1982 to mid-1984, *Newsweek* was printed in Nashville under a contract with an unrelated printing plant for mailing to subscribers in and out of Tennessee using mailing labels supplied by plaintiff. Since mid-1984, *Newsweek* has been printed outside of Tennessee. Manuscripts are prepared in New York and sent to New Jersey for assembly and then sent via satellite to the printer. During the period *Newsweek* was printed in Nashville, plaintiff had two employees on-site at the printing plant to oversee processing and distribution.

Plaintiff employs no sales force in Tennessee to sell subscriptions. Plaintiff's advertising sales force is based

in Atlanta and visits Tennessee to sell advertisements periodically, fewer than ten days a year. Any advertising orders are accepted and processed in New York.

As part of its news gathering, plaintiff sends reporters into Tennessee as needed and occasionally uses local "stringers" to send background material for articles appearing in *Newsweek*.

Subscriptions to *Newsweek* are sold in Tennessee by two methods. First, plaintiff receives direct subscriptions from customers in response to solicitations mailed into Tennessee from outside the state or in response to order forms in plaintiff's publications. Second, plaintiff receives subscriptions as a result of sales in Tennessee by third-party marketing companies, such as QSP, Inc. QSP, Inc. markets many periodicals by contract with schools and other organizations. Defendant is not claiming that plaintiff owes sales tax on subscriptions sold through third-party vendors, only on the direct mail-order subscriptions.

Conclusions of Law

I. Whether plaintiff has a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on the plaintiff.

The decisions of the United States Supreme Court on this issue are based largely on the facts of each case. This Court must find a nexus or relationship between the activity sought to be taxed, here, mail-order subscription sales, and the plaintiff's activity within Tennessee. *National Geographic Society v. Cal. Bd. of Equalization*, 430

U.S. 551 (1977). For Tennessee to impose a sales tax in the absence of such a nexus would be a violation of the commerce clause, Article I, Section 8 of the United States Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution.

Newsweek was printed in Tennessee from 1982 to mid-1984, subscriptions are solicited in the state by independent marketing companies and by solicitations mailed into the state by plaintiff, plaintiff's advertising sales people enter the state periodically to solicit advertising, plaintiff sends reporters into the state to gather news and occasionally employs the services of local news reporters. The Court concludes that all of these activities when taken together constitute a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on plaintiff's mail-order subscription sales.

II. Whether plaintiff's publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3).

Plaintiff forcefully asserts that they qualify for the newspaper exemption, T.C.A. § 67-6-329(3). There is a strong presumption against exemptions and in a suit by a taxpayer claiming exemption from taxation, the burden is on the taxpayer to clearly establish the right to the exemption. Any well-founded doubt is fatal to the taxpayer's claim. *Woods v. General Oils, Inc.*, 558 S.W.2d 433 (Tenn. 1977). Plaintiff's exemption claim is primarily based on their argument that their publications satisfy the definition of "newspaper" set forth in State Sales and

Use Tax Regulation 1320-5-1-.46 (Rule 46). Rule 46 provides as follows:

> *Publishers of newspapers, magazines, periodicals, etc.* –
>
> (1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of papers and ink used for manufacturing these papers are sales for further processing and are also exempt from the tax.
>
> (2) In order to constitute a newspaper, the publication must contain at least the following elements:
>
> (a) It must be published at stated short intervals, (usually daily or weekly).
>
> (b) It must not, when its successive issues are put together, constitute a book.
>
> (c) It must be intended for circulation among the general public.
>
> (d) It must contain matters of general interest or reports of current events.
>
> (3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interests, such as legal, mercantile, political, religious or sporting, if in addition to the special interests it serves, the alleged newspapers contain general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.
>
> (4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

(5) When subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

The parties have stipulated that *Newsweek* meets the criteria set forth in Rule 46(2). Nevertheless, the Court agrees with the defendant that in order to qualify for the newspaper exemption, a publication must be a newspaper in the common and popularly accepted usage of the term. *See Shoppers Guide Pub. Co., Inc. v. Woods*, 547 S.W.2d 561, 563 (1977). The Court finds that the legislature intended to exempt from sales tax newspapers in the natural, plain and ordinary understanding of the word newspaper and did not intend to include magazines. *See Gasson v. Gay*, 49 So. 2d 525, 526 (Fla. 1950).

After consideration of the evidence and arguments presented, the Court finds that plaintiff has failed to carry the burden of proof, as it must, that *Newsweek* is a newspaper and entitled to a sales tax exemption.

III. If plaintiff's publications are not exempt as newspapers, whether a tax on plaintiff's publications violates plaintiff's constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution; violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution; violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and Article II, Section 8 of the Tennessee Constitution.

a. freedom of the press and freedom of expression

Plaintiff's argument rests largely on the decision of the United States Supreme Court in *Arkansas Writers' Project, Inc. v. Ragland,* 95 L. Ed. 2d 209 (1987). Arkansas's sales tax on tangible personal property including publications contained broad exemptions for newspapers and religious, professional, trade and sports journals and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. The United States Supreme Court held the state's selective application of its sales tax to magazines to be violative of the First Amendment because the State failed to show that its content-based discrimination was necessary to serve a compelling state interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the state tax.

In the present case, the sales tax exemption is more narrowly drawn than in *Ragland.* Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. § 67-6-323. The State has not singled out a small group of magazines for taxation. The compelling state interest advanced by the defendant for exempting newspapers from taxation is to further freedom of the press and to reduce regulation in the area of the press. The Court finds that the state's interest in exempting newspapers from sales tax is sufficiently compelling. The defendant's decision not to exempt other periodicals from taxation is not a violation of freedom of the press or freedom of expression as

guaranteed by the constitutions of the United States and of Tennessee.

b. due process and equal protection

Discrimination as alleged by the plaintiff with respect to the taxing and nontaxing of magazines and newspapers under the taxing laws of this state does not rise to a level of discrimination which would cause the statute to be unconstitutional under the constitutions of the United States and of Tennessee.

> IV. Whether a tax on plaintiff's nonreligious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion.

The sales tax exemption on certain religious publications is pursuant to T.C.A. § 67-6-323:

> The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable services.

The defendant's asserted purpose in exempting the sale of religious publications to or by churches for use in religious services is to avoid excessive entanglement in religion. Plaintiff argues that any content-based discrimination violates the First Amendment, relying on *Regan v. Time, Inc.*, 468 U.S. 461, 648-49 (1984). The defendant, relying on *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), contends that the grant of a tax exemption is not a sponsorship or establishment of religion. The defendant is simply abstaining from demanding that the church support the state. The tax exemption

for religious publications sold by or to churches for use in religious services reinforces the desired separation between church and state. The Court finds the defendant's position persuasive and concludes that the exemption provided by T.C.A. § 67-6-323 is not an unconstitutional establishment of religion.

V. Whether plaintiff's publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

T.C.A. § 67-6-329(a)(23) exempts from sales and/or use tax:

> Magazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting.

Based on the facts of this case, the Court concludes that plaintiff is not exempt from the sales tax after March 20, 1987. Plaintiff is active within the state through independent contractor marketing companies, such as QSP, Inc., and its advertising salesmen who come to Tennessee to solicit advertising periodically.

The case will be dismissed. The attorney for the defendant will draw an order in accordance with this memorandum taxing the costs to the plaintiff.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

April 22, 1988

cc: Charles A. Trost
Daryl Brand

APPENDIX D

NEWSWEEK, INC.	)	IN THE CHANCERY
VS. NO. 86-1250-II(I)	)	COURT FOR THE STATE
	)	OF TENNESSEE 20TH
KATHRYN BEHM	)	JUDICIAL DISTRICT
CELAURO	)	DAVIDSON COUNTY,
COMMISSIONER OF	)	PART ONE
REVENUE, STATE	)	FILED JUN 1 1988
OF TENNESSEE	)	

MEMORANDUM

This action is before the Court, pursuant to Rule 52, T.R.C.P. and upon agreement of the parties, as evidenced by the Agreed Order entered on May 23, 1988, in Minute Book 269, page 5. The Agreed Order moves the Court to reconsider and amend by striking the footnote on page one (1) of the Court's Memorandum filed April 22, 1988, which footnote states as follows:

> Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

Upon review of the record, the Court is of the opinion and finds that the footnote should be stricken, therefore, plaintiff's motion to reconsider and to amend the footnote is granted.

Plaintiff's Claim for Refund of Penalty

Plaintiff Newsweek, Inc. argues that it is entitled to a refund or abatement of the penalty assessed against it by the defendant Commissioner of Revenue for the State of Tennessee. The plaintiff contends that at the time the tax

liability was incurred, its liability was unclear and unsettled, that is, whether its publication fitted within the literal language of the regulations as being an exempt newspaper.

In *Benson v. United States Steel Corporation*, 465 S.W.2d 124, 130 (Tenn. 1971), the Court held that in tax penalty cases, the courts have the power to remit penalties, if the equities demand such remission. The Court listed four guidelines for determining which cases show good and reasonable cause for remission of the tax penalty. The plaintiff Newsweek, Inc. relies on the third guideline:

> (3) The provisions of the pertinent law or regulations were at the time the deficiency was incurred unsettled, unclear or misleading to a reasonable person and the taxpayer acted in good faith upon a reasonable though mistaken application of such law or regulations, with the result that the tax deficiency in question was incurred.

See Tidwell v. Goodyear Tire & Rubber Company, 520 S.W.2d 721, 725 (Tenn. 1975); *Service Merchandise Co., Inc. v. Jackson*, 735 S.W.2d 443 (Tenn. 1987) and T.C.A. § 67-1-803(c)(1)(C).

This Court finds that plaintiff's claim that the law was unclear and unsettled as to whether its publication was an exempt newspaper and, therefore, not subject to sales tax is without merit. Plaintiff's publication is a magazine which is subject to the Sales and Use Tax. Therefore, plaintiff's request for refund or remission of the tax penalty is denied.

Application of Local Option Sales Tax

The plaintiff contends that nexus with the State of Tennessee is insufficient for the defendant's imposition of a local option sales tax on plaintiff's publication. However, the evidence shows that *Newsweek* magazine was printed in Nashville from the year 1982 to mid-1984 and during this period *Newsweek* had two employees on-site to oversee the processing and distribution of the magazine.

Among the methods by which subscriptions of *Newsweek* are sold in Tennessee are in response to solicitations mailed into Tennessee and in response to order forms in the *Newsweek* magazine. Thus, the Court finds that *Newsweek* is engaged in the business of making sales within the State of Tennessee. Therefore, it is subject to the local option sales tax. The defendant has violated neither the federal nor state constitutions. *See Pidgeon-Thomas Iron Company v. Garner*, 495 S.W.2d 826, 830 (Tenn. 1973). *See also* T.C.A. § 67-6-702.

The attorney for the defendant shall prepare an order incorporating the Court's Memorandum filed on April 22, 1988 and the instant Memorandum. The costs are taxed to the plaintiff.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

June 1, 1988

cc: Charles A. Trost
Daryl Brand

APPENDIX E

SOUTHERN LIVING, INC.	)	
VS. NO. 86-933-I	)	IN THE CHANCERY
KATHRYN BEHM CELAURO	)	COURT FOR THE
and	)	STATE OF TENNESSEE
PROGRESSIVE FARMER, INC.	)	20TH JUDICIAL
VS. NO. 86-934-II(I)	)	DISTRICT DAVIDSON
KATHRYN BEHM CELAURO	)	COUNTY PART ONE
	)	FILED 1988 APR 22

MEMORANDUM

These consolidated actions were brought for the recovery of sales taxes, penalty and interest paid by plaintiffs under protest. Defendant Commissioner of Revenue has assessed a sales and/or use tax on plaintiffs' mail-order subscription sales in Tennessee pursuant to the Retailers' Sales Tax Act, T.C.A. § 67-6-201, *et seq.* for the years 1985 through the present.

The plaintiffs raise the following five issues:* 1) whether plaintiffs have a sufficient nexus with Tennessee to give the State a constitutional basis upon which to impose the sales tax; 2) whether plaintiffs' publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3); 3) if plaintiffs' publications are not exempt

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* Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

as newspapers, whether a tax on plaintiffs' publications violates plaintiffs' constitutional rights under the United States' and Tennessee Constitutions; 4) whether the taxation of non-religious publications such as plaintiffs', while exempting certain religious publications from taxation, violates the United States' and Tennessee Constitutions; and 5) whether plaintiffs' publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

Findings of Fact

The facts of this case were stipulated by the parties. The Court adopts all of the facts which are set forth in stipulation; however, for purposes of brevity all of the facts will not be recited here.

Plaintiffs Southern Living, Inc. and Progressive Farmer, Inc. are Delaware corporations with their principal places of business in Birmingham, Alabama. They publish, respectively, *Southern Living* and *Progressive Farmer*. Plaintiff Southern Living, Inc. also publishes *Creative Ideas for Living*. The State assessed tax deficiencies for sales taxes alleged to be due for mail-order subscription sales of plaintiffs' publications to Tennessee residents.

Plaintiff Southern Living, Inc. (Southern Living) has no office in Tennessee, and Progressive Farmer, Inc. (Progressive Farmer) has editorial offices in Nashville and Memphis. Plaintiffs' publications are printed in Nashville under a contract with an unrelated company. Manuscripts for publications are prepared in Alabama and mailed on film to the Tennessee printer. The Tennessee printer mails

the publications to subscribers in a number of states including Tennessee using mailing labels supplied by plaintiffs. Copies are also delivered to wholesalers by common carrier.

Plaintiffs employ no sales force in Tennessee to sell subscriptions. Plaintiffs' advertising sales force is based in Atlanta and visits Tennessee to sell advertisements in plaintiffs' publications. Any advertising orders are accepted and processed in Alabama.

Subscriptions to plaintiffs' publications are sold in Tennessee by two methods. First, plaintiffs receive direct subscriptions from customers in response to solicitations mailed into Tennessee from outside the state or in response to order forms in plaintiffs' publications. Second, plaintiffs receive subscriptions as a result of sales in Tennessee by third-party marketing companies, such as QSP, Inc. QSP, Inc. markets many periodicals by contract with schools and other organizations. Defendant is not claiming that plaintiffs owe sales tax on subscriptions sold through third-party vendors, only on the direct mail-order subscriptions.

Conclusions of Law

I. Whether plaintiffs have a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on the plaintiffs.

The decisions of the United States Supreme Court on this issue are based largely on the facts of each case. This Court must find a nexus or relationship between the activity sought to be taxed, here, mail-order subscription

sales, and the plaintiffs' activity within Tennessee. *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977). For Tennessee to impose a sales tax in the absence of such a nexus would be a violation of the commerce clause, Article I, Section 8 of the United States Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution.

Both plaintiffs' publications are printed in Tennessee by an independent contractor, subscriptions are solicited in the state by independent marketing companies and by solicitations mailed into the state by plaintiffs, plaintiffs' advertising sales people enter the state at regular intervals to solicit advertising and plaintiff Progressive Farmer maintains two editorial offices in Tennessee. The Court concludes that all of these activities when taken together constitute a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on plaintiffs' mail-order subscription sales.

II. Whether plaintiffs' publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3).

Plaintiffs forcefully assert that they qualify for the newspaper exemption, T.C.A. § 67-6-329(3). There is a strong presumption against exemptions and in a suit by a taxpayer claiming exemption from taxation, the burden is on the taxpayer to clearly establish the right to the exemption. Any well-founded doubt is fatal to the taxpayer's claim. *Woods v. General Oils, Inc.*, 558 S.W.2d 433 (Tenn. 1977). Plaintiffs' exemption claim is primarily based on their argument that their publications satisfy

the definition of "newspaper" set forth in State Sales and Use Tax Regulation 1320-5-1-.46 (Rule 46). Rule 46 provides as follows:

> *Publishers of newspapers, magazines, periodicals, etc.–*
>
> (1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of papers and ink used for manufacturing these papers are sales for further processing and are also exempt from the tax.
>
> (2) In order to constitute a newspaper, the publication must contain at least the following elements:
>
> (a) It must be published at stated short intervals, (usually daily or weekly).
>
> (b) It must not, when its successive issues are put together, constitute a book.
>
> (c) It must be intended for circulation among the general public.
>
> (d) It must contain matters of general interest or reports of current events.
>
> (3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interests, such as legal, mercantile, political, religious or sporting, if in addition to the special interests it serves, the alleged newspapers contain general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.
>
> (4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

> (5) When subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

Plaintiffs' publications clearly meet the criteria presented in Rule 46(2)(b) and (2)(c). They do not, however, satisfy the requirements of Rule 46(2)(a) and (2)(d). Monthly publication is not a "short interval" as required by Rule 46(2)(a). With regard to Rule 46(2)(d), the parties have stipulated that plaintiff Southern Living's publications contain matters of general interest and reports of current events relating to the Southern region of the United States and that *Progressive Farmer* contains matters of general interest and reports of current events which relate to farming, agriculture and rural life in the United States. The Court finds that both publications are devoted exclusively to matters of localized or specialized interest. If a national disaster occurred, one would not read the news in *Southern Living, Creative Ideas for Living,* or *Progressive Farmer.* One would, however, be able to learn the news from the *Grundy County Herald,* another publication containing primarily matters of localized interest which nevertheless meets the definition of newspaper. Plaintiffs' publications contain no general news of the day or news of importance and of current interest to the general public as required by Rule 46(3).

In addition to the guidance provided by Rule 46, this Court may consider the common and popularly accepted usage of the term, "newspaper." *Shoppers Guide Pub. Co., Inc. v. Woods,* 547 S.W.2d 561, 563 (1977).

After consideration of the evidence and the arguments presented, the Court finds that plaintiffs have failed to carry the burden of proof, as they must, that *Southern Living, Creative Ideas for Living* and *Progressive Farmer* are newspapers and entitled to a sales tax exemption.

III. If plaintiffs' publications are not exempt as newspapers, whether a tax on plaintiffs' publications violates plaintiffs' constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution; violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution; violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and Article II, Section 8 of the Tennessee Constitution.

a. freedom of the press and freedom of expression

Plaintiffs' argument rests largely on the decision of the United States Supreme Court in *Arkansas Writers' Project, Inc. v. Ragland*, 95 L. Ed. 2d 209 (1987). Arkansas's sales tax on tangible personal property including publications contained broad exemptions for newspapers and religious, professional, trade and sports journals and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. The United States Supreme Court held the state's selective application of its sales tax to magazines to be violative of the First Amendment

because the State failed to show that its content-based discrimination was necessary to serve a compelling state interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the state tax.

In the present case, the sales tax exemption is more narrowly drawn than in *Ragland*. Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. § 67-6-323. The State has not singled out a small group of magazines for taxation. The compelling state interest advanced by the defendant for exempting newspapers from taxation is to further freedom of the press and to reduce regulation in the area of the press. The Court finds that the state's interest in exempting newspapers from sales tax is sufficiently compelling. The defendant's decision not to exempt other periodicals from taxation is not a violation of freedom of the press or freedom of expression as guaranteed by the constitutions of the United States and of Tennessee.

b. due process and equal protection

Discrimination as alleged by the plaintiffs with respect to the taxing and nontaxing of magazines and newspapers under the taxing laws of this state does not rise to a level of discrimination which would cause the statute to be unconstitutional under the constitutions of the United States and of Tennessee.

IV. Whether a tax on plaintiffs' nonreligious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion.

The sales tax exemption on certain religious publications is pursuant to T.C.A. § 67-6-323:

> The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable services.

The defendant's asserted purpose in exempting the sale of religious publications to or by churches for use in religious services is to avoid excessive entanglement in religion. Plaintiffs argue that any content-based discrimination violates the First Amendment, relying on *Regan v. Time, Inc.*, 468 U.S. 461, 648-49 (1984). The defendant, relying on *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), contends that the grant of a tax exemption is not a sponsorship or establishment of religion. The defendant is simply abstaining from demanding that the church support the state. The tax exemption for religious publications sold by or to churches for use in religious services reinforces the desired separation between church and state. The Court finds the defendant's position persuasive and concludes that the exemption provided by T.C.A. § 67-6-323 is not an unconstitutional establishment of religion.

V. Whether plaintiffs' publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

T.C.A. § 67-6-329(a)(23) exempts from sales and/or use tax:

> Magazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting.

Based on the facts of this case, the Court concludes that plaintiffs are not exempt from the sales tax after March 20, 1987. Plaintiffs are active within the state through independent contractor marketing companies, such as QSP, Inc., and their advertising salesman who come to Tennessee to solicit advertising ten to twelve times each year.

The case will be dismissed. The attorney for the defendant will draw an order in accordance with this memorandum taxing the costs to the plaintiffs.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

April 22, 1988

cc: Charles A. Trost
Daryle Brand

APPENDIX F

SOUTHERN LIVING, INC. VS. NO. 86-933-I KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE PROGRESSIVE FARMER, INC. VS. NO. 86-934-II(I) KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE	)	IN THE CHANCERY COURT FOR THE STATE OFTENNESSEE 20TH JUDICIAL DISTRICT DAVIDSON COUNTY PART ONE FILED 1988 Jun 1

MEMORANDUM

These consolidated actions are before the Court, pursuant to Rule 52, T.R.C.P. and upon agreement of the parties, as evidence by the Agreed Order entered on May 23, 1988, in Minute Book 269, page 5. The Agreed Order moves the Court to reconsider and amend by striking the footnote on page one (1) of the Court's Memorandum filed April 22, 1988, which footnote states as follows:

> Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

Upon review of the record, the Court is of the opinion and finds that the footnote should be stricken, therefore, plaintiffs' motion to reconsider and to amend the footnote is granted.

Plaintiffs' Claim for Refund of Penalty

Plaintiffs, Southern Living, Inc. and Progressive Farmer, Inc., argue that they are entitled to a refund or abatement of the penalty assessed against them by the defendant Commissioner of Revenue for the State of Tennessee. Plaintiffs contend that at the time the tax liability was incurred, "it was unclear and unsettled whether its publications fit within the literal language of the regulations as being an exempt 'newspaper.' "

In *Benson v. United States Steel Corporation*, 465 S.W.2d 124, 130 (Tenn. 1971), the Court held that in tax penalty cases, the courts have the power to remit penalties, if the equities demand such remission. The Court listed four guidelines for determining which cases show good and reasonable cause for remission of the tax penalty. The plaintiffs herein rely on the third guideline:

> (3) The provisions of the pertinent law or regulations were at the time the deficiency was incurred unsettled, unclear or misleading to a reasonable person and the taxpayer acted in good faith upon a reasonable though mistaken application of such law or regulations, with the result that the tax deficiency in question was incurred.

See Tidwell v. Goodyear Tire & Rubber Company, 520 S.W.2d 721, 725 (Tenn. 1975); *Service Merchandise Co., Inc. v. Jackson*, 735 S.W.2d 443 (Tenn. 1987) and T.C.A. § 67-1-803(c)(1)(C).

This Court finds that plaintiffs' claim that the law was unclear and unsettled as to whether their publications were exempt newspapers and, therefore, not subject to sales tax is without merit. Plaintiffs' publications are magazines which are subject to the Sales and Use Tax. Therefore, plaintiffs' request for refund or remission of the tax penalty is denied.

Application of Local Option Sales Tax

Plaintiffs contend that nexus with the State of Tennessee is insufficient for the defendant's imposition of a local option sales tax on plaintiffs' publications. However, the evidence shows that plaintiff Southern Living, Inc. had its place of business at the Baird Ward Printing Company in Nashville, Davidson County, Tennessee. Plaintiff Progressive Farmer, Inc. maintained editorial offices in Memphis, Shelby County, Tennessee and in Nashville, Davidson County, Tennessee. Therefore, the Court finds that the plaintiffs were engaged in the business of making sales within the State of Tennessee, thus they are subject to the local option sales tax. The defendant has violated neither the federal nor state constitutions in imposing this tax. *See Pidgeon-Thomas Iron Company v. Garner*, 495 S.W.2d 826, 830 (Tenn. 1973). *See also* T.C.A. § 67-6-702.

The attorney for the defendant shall prepare an order incorporating the Court's Memorandum filed on April 22,

1988 and the instant Memorandum. The costs are taxed to the plaintiffs.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

June 1, 1988

cc: Charles A. Trost
Daryl Brand

APPENDIX G

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NEWSWEEK, INC., Plaintiff/Appellant,	)	FOR PUBLICATION
v.	)	MAY 14, 1990
KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	DAVIDSON CHANCERY
Defendant/Appellee.	)	S/Ct No. 88-54-I
	)	FILED MAY 14 1990

ORDER ON PETITION TO REHEAR

The Court has carefully reviewed the grounds stated in the petition to rehear, and conclude that we have not misapprehended either the law or the facts.

The petition to rehear is denied.

Enter this 14 day of May, 1990.

PER CURIAM

APPENDIX H

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SOUTHERN LIVING, INC., PROGRESSIVE FARMER, INC.,	)	FOR PUBLICATION
Plaintiffs/Appellants,	)	MAY 14, 1990
v.	)	DAVIDSON CHANCERY
KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	S/Ct No. 88-53-I
Defendant/Appellee.	)	FILED MAY 14 1990

ORDER ON PETITION TO REHEAR

The Court has carefully reviewed the grounds stated in the petition to rehear, and conclude that we have not misapprehended either the law or the facts.

The petition to rehear is denied.

Enter this 14 day of May, 1990.

PER CURIAM

APPENDIX I

TENNESSEE ADMINISTRATIVE COMPILATION

1320-5-1-.46 PUBLISHERS OF NEWSPAPERS, MAGAZINES, PERIODICALS.

(1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of paper and ink used for manufacturing newspapers are sales for further processing and are also exempt from tax.

(2) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must contain matters of general interest and reports of current events.

(3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

(4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

(5) Where subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

(6) Publishers of books, loose leaf reports, etc., concerning banking, business, insurance, tax and other similar types of information, law, cases, etc., and concerning events such an contractor activities, social and sports events, credit etc., where there is a general distribution of the same book, report, or other publication, shall be deemed to be dealers, and such books, reports, and other publications shall be subject to the Sales and Use Tax. Where a special report is made, and no general distribution is made of the report, no Sales or Use Tax is due.

(7) The sale or use of shoppers advertisers using newsprint distributed in this state or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper is exempt from tax.

Authority: T.C.A. §§ 67-1-102 and 67-6-402. Administrative History: Original rule certified June 7, 1974. Amendment filed March 3, 1983; effective June 15, 1983.

(2)

No. 90-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC., SOUTHERN LIVING, INC., and PROGRESSIVE FARMER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

---

BRIEF IN OPPOSITION OF RESPONDENTS, SOUTHERN LIVING, INC. AND PROGRESSIVE FARMER, INC.

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Petition For a Writ of Certiorari seeks to have this Court review decisions of the Supreme Court of Tennessee which rest upon an adequate and independent state law ground such as would deprive this Court of jurisdiction.

2. Whether Tennessee's content-based imposition of its sales tax on the sale of Respondents' "magazines," while exempting sales of "newspapers" from such tax, violates Respondents' First Amendment right to freedom of the press.

3. Whether special and important reasons exist sufficient to justify this Court exercising its discretion to grant a writ of certiorari.

THE PARTIES

Petitioner is the officer charged with the duty of enforcing the tax laws of the State of Tennessee and collecting its revenues.

Respondents, Southern Living, Inc. and Progressive Farmer, Inc., are affiliated Delaware corporations owned by Southern Progress Corporation.* The other Respondent, Newsweek, Inc., is not related to these Respondents.**

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* Southern Progress Corporation, is a wholly owned subsidiary of The Time Inc. Magazine Company, a wholly owned subsidiary of Time Warner Inc. Progressive Farmer, Inc. owns no subsidiaries. All subsidiaries of Southern Progress Corporation and Southern Living, Inc. are wholly owned by them. Other subsidiaries of The Time Inc. Magazine Company not wholly owned by it are: American Family Publishers, Emerge Communications, Inc. and Fortune Italia, S.P.A. Time Warner Inc. also owns: American Television and Communications Corporation and S.S. Communications Inc. all of its other subsidiaries are wholly owned by it.

** Separate suits were filed on behalf of each of the three Respondents. Those of Southern Living, Inc. and Progressive Farmer, Inc. were consolidated for trial. The Newsweek suit was tried separately. Southern Living, Inc. and Progressive Farmer, Inc. filed a joint Notice of Appeal. Newsweek, Inc. filed a separate Notice of Appeal. The cases on appeal were briefed separately and argued separately. The Supreme Court of Tennessee rendered an opinion in both the Newsweek case and the consolidated Southern Living/ Progressive Farmer case. The Commissioner of Revenue seeks review of those two separate, albeit related, judgments with a single writ of certiorari. The Respondents elect to file separate responses to this petition corresponding to the two judgments of the Tennessee Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-273

COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC., SOUTHERN LIVING, INC., and PROGRESSIVE FARMER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

---

BRIEF IN OPPOSITION OF RESPONDENTS, SOUTHERN LIVING, INC. AND PROGRESSIVE FARMER, INC.

Respondents, Southern Living, Inc., and Progressive Farmer, Inc., submit this Brief in Opposition to the Petition For a Writ of Certiorari to the Supreme Court of Tennessee filed on August 10, 1990 by the Commissioner of Revenue of the State of Tennessee.

STATEMENT OF THE CASE

Respondents are publishers of monthly periodicals, *Southern Living*, *Creative Ideas for Living*, and *Progressive Farmer*. Petitioner assessed deficiencies (taxes and interest) against Respondents (and a penalty against

Southern Living, Inc.) for uncollected sales[1] taxes on its mail order subscription sales[2] of its periodicals to residents of Tennessee. Respondents paid the assessments "under protest," and filed separate suits for refund.

The grounds for refund[3] were essentially the same in each case:

> (1) Respondents do not have sufficient contacts with Tennessee to give the State taxing jurisdiction to impose its sales tax on Respondents' mail order subscription sales of periodicals to Tennessee residents.
>
> (2) Each of Respondents' publications is a "newspaper" exempt from tax under Tennessee Code Annotated § 67-6-329(a)(3), as defined by Tennessee Department of Revenue Regulations, Section 1320-5-1-.46 ("Rule 46").[4]

---

[1] Petitioner calls them "use" taxes. The Stipulation says that they are "sales and/or use" taxes. (Resp. Appx. p. 6a, 13a).

[2] Taxes paid on "over the counter" sales are not at issue here.

[3] Southern Living, Inc. seeks to recover $1,327,845.51 (including $185,298.71 penalty). Progressive Farmer, Inc. seeks to recover $42,123.79. Recovery of additional taxes paid subsequent to the filing of the original suit is also pending in these and related other suits. Petitioner, complains that "these decisions, if left standing, would cause Tennessee state and local governments significant losses of critically needed revenues." Petitioner "conservatively estimates that Tennessee would derive at least $2.7 million per year in state and local revenue from taxation of magazine subscriptions." (Petition, n.2). The argument misses the point. In the first place, the record shows that the Act of the Tennessee General Assembly which exempts "newspapers" from the sales and use tax costs the State of Tennessee $2,665,384.64 annually just from sales of Nashville's two daily newspapers. *The Tennessean* and *The Nashville Banner*, not counting the dozens of other newspapers sold in the state. Moreover, the need to collect more revenue is no justification for violating Respondents' First Amendment rights. *See* pp. 9 through 12, *infra*.

[4] Tenn. Comp. R. & Regs. tit. 17, ch. 1320-5-1-.46.

(3) If each of the Respondents' publications is not an exempt "newspaper," imposition of the sales tax on sales of such publications violates Respondents' constitutional rights as follows:

(A) Respondents' Freedom of the Press rights under the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution are violated.

(B) A determination of what is a "newspaper" based on the "common and ordinary usage" of the word, criteria different from the four criteria set forth in Rule 46, is so vague as to deny Respondents due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution.

(C) The exemption denies Respondents equal protection and equal treatment under the law guaranteed to them by the Fourteenth Amendment to the United States Constitution and Article XI, Section 8 of the Tennessee Constitution.

(4) Imposition of sales tax on sales of Respondents' non-religios publications, while exempting sales of religious publications pursuant to Tennessee Code Annotated § 67-6-323, is a violation of the establishment of religion provisions of the First Amendment to the United States Constitution and of Article I, Section 3 and Article XI, Section 8 of the Tennessee Constitution.

(5) Imposition of the penalty was inequitable.

After a trial, the Chancellor dismissed Respondents' suits, holding that imposition of the tax did not violate their federal and state constitutional rights and that imposition of the penalties was not inequitable. Respond-

ents appealed the Chancellor's decisions to the Supreme Court of Tennessee and raised on appeal all of the same claims asserted in the trial court.

The Supreme Court of Tennessee reversed and unanimously held that:

> We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs [*Southern Living, Inc. and Progressive Farmer, Inc.*] and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Art. I, Sec. 19 of the Tennessee Constitution.

Southern Living, Inc. v. Celauro, 789 S.W.2d 251, 252 (Tenn. 1990).[5]

The Court noted that Respondents' Establishment Clause claims, as well as the other issues raised by Respondents on appeal, were "pretermitted" by the Court's Freedom of the Press ruling, but said, "We believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc. v. Bullock*, —— U.S. ——, 109 S.Ct. 890, —— L.Ed.2d —— (1989)." *Southern Living*, 789 S.W.2d at 253.

The Commissioner of Revenue's Petition for a Rehearing was denied by an Order of the Tennessee Supreme Court entered May 14, 1990. The instant Petition For a Writ of Certiorari was filed August 10, 1990. Copies of the Petition were delivered to Respondents' counsel of record August 13, 1990.

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[5] The Supreme Court of Tennessee held similarly in *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn. 1990), issued on the same day.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition For a Writ of Certiorari should be denied for the following reasons:

I. THIS COURT LACKS JURISDICTION TO DECIDE THESE CASES BECAUSE THE DECISIONS PETITIONER SEEKS TO HAVE REVIEWED REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND

The Supreme Court of Tennessee held:

> We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution *and* Art. I, Sec. 19 of the Tennessee Constitution.

Southern Living, 789 S.W.2d at 252 (emphasis added).[6]

This Court traditionally has refrained from reviewing cases in which a state court decision is based upon both a federal ground and an adequate and independent state ground. This restraint has been stated in terms of a limitation on the Court's jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117 (1945) holds:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems *and in the limitations on our own jurisdiction.* Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong

---

[6] Art. I, Section 19 of the Tennessee Constitution guarantees "freedom of speech and press." (See Resp. Appx. p. 1a).

> judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

Id. at 126 (emphasis added).

In order to determine whether "an adequate and independent state ground" exists, this Court requires a "plain statement" by the state court that its decision rests upon an adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

The quoted holding of the Supreme Court of Tennessee is a "plain statement" that there is an adequate and independent state ground for the decisions in these cases, parallel to the one found in the First Amendment. The Supreme Court of Tennessee held that the protection of speech and press found in the Tennessee Constitution had a scope "at least as broad as that afforded those freedoms by the First Amendment to the United States Constitution." *Southern Living*, 789 S.W.2d at 253.

Therefore, this Court should deny the Petition For a Wrti of Certiorari.

II. TENNESSEE'S CONTENT-BASED TAXING SCHEME VIOLATES RESPONDENTS' FIRST AMENDMENT FREEDOMS AND THE JUDGMENT OF THE SUPREME COURT OF TENNESSEE WAS CORRECTLY DECIDED

The "Question Presented" by Petitioner misstates the decision of the Supreme Court of Tennessee, which correctly held under the facts presented in the record that the challenged taxing scheme was not "content-neutral", and properly applied "strict scrutiny" to the State's asserted justifications.

A. The taxing scheme challenged by Respondents is not "content-neutral"

Petitioner stated the "Question Presented" as follows:

> Whether the Equal Protection Clause and the First Amendment require that state tax and exemption statutes providing content-neutral distinctions between different segments of the communications media, such as between newspapers and magazines, must satisfy strict scrutiny.

(Petition, page i).

The Supreme Court of Tennessee rejected Petitioner's argument, advanced for the first-time on appeal, that the newspaper exemption can be justified as "content-neutral". The Court concluded that:

> This analysis does not pass muster in light of the requirement that in order to qualify for the newspaper exemption in Tennessee, among other things, a publication must contain matters of general interest and reports of current events. Rule 46 (2) (d). *This is not a content-neutral requirement.*

Newsweek, 789 S.W.2d at 249. (Emphasis added).

The "Question Presented" by petitioner incorrectly characterizes as "content-neutral" the taxing distinctions made by Tennessee's authorities among elements of the print media. Rule 46, establishes four criteria by which Petitioner defines a "newspaper" for purposes of applying the exemption statute:

> (2) In order to constitute a newspaper the publication must contain at least the following elements:
>
> (a) It must be published at stated short intervals (usually daily or weekly).
>
> (b) It must not, when its successive issues are put together, constitute a book.
>
> (c) It must be intended for circulation among the general public.

(d) *It must contain matters of general interest or reports of current events.*

Tenn. Comp. R. & Regs. tit. 17, ch. 1320-S-1-.46 (1983). (Emphasis added)

The State's only witness, Mr. Bracey, the Director of the Sales and Use Tax division, when questioned on cross-examination how he would determine whether or not a publication was an exempt "newspaper," testified, "I guess I'm saying what I would like to do is take each case on its own merits and *look at the contents of the paper.*" [7]

Plainly stated, application of Rule 46 requires at a minimum, that in order to determine whether a publication is a "newspaper" for purposes of the tax exemption,

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[7] Transcript Trial Proceedings, p. 62 (Resp. Appx. p. 23a) (emphasis added). A reading of that portion of Mr. Bracey's trial testimony in Respondents' Appendix at pages 18a-23a, demonstrates that in extending or withholding the statutory exemption available to "newspapers", the Department, whether applying the published criteria of Rule 46 or applying other unpublished criteria, makes an analysis of the *content* of the publication without regard to its form. On direct examination Mr. Bracey stated, "In other words, a newspaper *contains* news, instead of just being for entertainment or enjoyment." (Bracey, Trial Transcript, p. 24, Resp. Appx. p. 19a) (emphasis added). Again, on direct examination he stated (with respect to his perusal of *Southern Living*), "I might indicate, too, whether it *contains* matters of general interest and reports of current events. I would say it does not." (Bracey, Trial Transcript, p. 26. Resp. Appx. p. 21a) (emphasis added). Petitioner would have this Court ignore the facts testified to by the State's own official representative as to how the statutory "newspaper" exemption is actually applied by Department of Revenue officials with reference to the contents of the publication. Petitioner asks this Court to presume, without any factual predicate whatever, that the State makes a "content-neutral" determination as to which publications are exempt "newspapers" and which are taxable "magazines". The State's assertion that this is a "content-neutral" taxing scheme blatantly disregards the testimony of its own witness, and is contrary to the finding of the Supreme Court of Tennessee that this is not a content-neutral taxing scheme.

a bureaucrat in the Tennessee Department of Revenue must examine its contents to see if it contains "matters of general interest and reports of current events." The Tennessee Supreme Court properly held that this content-based discrimination violates the First Amendment, citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987).[8]

B. The Supreme Court of Tennessee properly applied strict scrutiny to Tennessee's content-based taxing scheme

The legal issue decided by the Supreme Court of Tennessee involved Federal and State constitutional provisions regarding freedom of the press.[9] In making its analysis the Supreme Court of Tennessee properly applied "strict scrutiny" under the relevant decisions previously enunciated by this Court. In *Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue*, 460 U.S.

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[8] The holding relied upon by the Supreme Court of Tennessee reads as follows:

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content .... [citations omitted.]

Arkansas Writers', 481 U.S. 221, 229-30.

[9] "We look initially to the constitutional claims charging violation of plaintiff's first amendment guarantees of freedom of the press and freedom of expression. *These claims are dispositive if found against the State.*" *Newsweek*, 789 S.W.2d at 248 (emphasis added). "We hold therefore the tax is invalid under the First Amendment." *Id.* at 250. "We are of the opinion that the Tennessee tax scheme is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Art. I, Sec. 19 of the Tennessee Constitution." *Southern Living*, 789 S.W.2d at 252.

575 (1983), this Court held that the First Amendment precludes a state from imposing a tax only on the press and that the tax also violated the plaintiff's First Amendment rights because it targeted a small group of newspapers.

The Tennessee tax scheme targets for taxation certain individual publications within the press—"non-newspapers"—and exempts others—"newspapers". The justification posed for the first time by the State on appeal—that of promoting dissemination of "news and information" on an "immediate" basis (an immediacy presumably, but without a factual predicate, unavailable to magazines)—was correctly rejected by the Supreme Court of Tennessee.[10]

The Tennessee Supreme Court's reliance on *Arkansas Writers'* is not misplaced. In *Arkansas Writers'*, this Court declared the Arkansas sales and use tax scheme which exempted all newspapers and certain magazines, but imposed the tax on plaintiff's general interest monthly publication, *Arkansas Times*, to be invalid and a violation of the plaintiff's First Amendment right to freedom of the press.

The thrust of Petitioner's argument seems to be that the Supreme Court of Tennessee improperly analyzed

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[10] Petitioner prevailed in the Chancery Court on his justification advanced at trial that the taxing scheme "reduced regulations" and "furthered freedom of the press" and was therefore a sufficiently compelling state interest to warrant exempting newspapers. On appeal Petitioner abandoned this indefensible and insufficiently compelling justification and asserted a new one—that the State could rationally encourage the swift and immediate dissemination of "news and information" to the public by exempting "newspapers". Any argument that this justification constitutes a "compelling state interest" has been laid to rest in *Arkansas Writers'*, where this Court held that "[w]hile this state interest [to foster communications] might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers." *Arkansas Writers'* at 232. It was rejected as well by the Supreme Court of Tennessee.

these cases in terms of the State's violation of the First Amendment and incorrectly applied the "strict scrutiny" test set forth in both *Minneapolis Star* and *Arkansas Writers'*. Petitioner seeks to have this Court "analyze this case solely as a problem of equal protection, applying the familiar tiers of scrutiny." [11] Petitioner relies on *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and asserts that in *Taxation With Representation* "this Court recognized that distinctions in tax statutes are to be evaluated according to the 'rational basis' standard of equal protection analysis, even in cases involving First Amendment interests, unless the statutes suppress expression or employ suspect classifications such as race or national origin." (Petition p. 11).

Petitioner argue incorrectly that *Taxation With Representation* establishes a "reasonable basis" test in First Amendment cases involving a state's discriminatory tax treatment of different types of print media. While *Taxation With Representation* involved a content-neutral [12] federal taxing scheme with First Amendment implications, it is inapplicable to these cases, which involve content based tax discrimination by the State between different members of the print media.

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[11] The majority opinion in applying a "strict scrutiny" analysis in *Minneapolis Star*, 460 U.S. 575, 585 points out in footnote 7 that "equal protection" was the analysis and level of scrutiny advanced in the dissenting opinion in that case.

[12] Justice Blackmun (with whom Justices Brennan and Marshall joined) concurred in the majority opinion and wrote:

> Because 26 U.S.C. § 501's discrimination between veteran's organizations and charitable organizations is *not based on the content* of their speech, *ante*, at 548, I agree with the Court that § 501 does not deny charitable organizations equal protection of the law.

Taxation With Representation, 461 U.S. 540, 551. (Emphasis added).

In summary, the question presented in the Petition does not accurately state the judgment which Petitioner seeks to have reviewed. Rather than "content-neutral" as alleged in the Petition, Tennessee's taxing scheme is clearly content-based. The Supreme Court of Tennessee properly applied strict scrutiny to the challenged statute. Therefore, there are no special and important reasons why this Court should exercise its judicial discretion to review the decision of the Supreme Court of Tennessee in this case. The Petition For a Writ of Certiorari is not well taken and should be denied.

III. THERE IS NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION AND GRANT A WRIT OF CERTIORARI

None of the criteria of Rule 10.1 of the Rules of the Supreme Court of the United States which guide this Court in the exercise of its discretion to grant or deny petitions for a writ of cetriorari are present in this case. No decision by a United States Court of Appeals is involved. The federal constitutional issued decided by the Tennessee Supreme Court has been decided by this Court and the Tennessee Court's decision was in accordance with those controlling precedents. Finally, the decisions of the various state courts of last resort which have ruled on the First Amendment issue presented here are in accord with the decision of the Supreme Court of Tennessee. *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900 (La. App. 1987); *McGraw-Hill, Inc. v. State Tax Comm'n.*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (N.Y. App. Div. 1989), aff'd 552 N.E.2d 163, 552 N.Y.S.2d 915 (N.Y. 1990); *The Hearst Corp. v. Director of Revenue*, 779 S.W.2d 559 (Mo. 1989); *Dow Jones & Co., Inc. v. Oklahoma Tax Comm'n.*, 787 P.2d 843 (Okla. 1990); *Dept. of Revenue v. Magazine Publishers of America, Inc.*, No. 75,201 (Fla. May 31, 1990) (LEXIS, States Library, Fla. file); *Medlock v. Pledger*, 785 S.W.2d 202 (Ark. 1990).

The decision of the Supreme Court of Tennessee pretermitted other federal and state constitutional issues presented to it on appeal, each of which issues would sustain a judgment in Respondents' favor. Those pretermitted issues are not before this Court.

Respondents say their publications are "newspapers" as defined in Rule 46. Petitioner says that Respondents' publications do not precisely fit Rule 46, but that nevertheless Rule 46 is not determinative of the issue, and that none of Respondents' publications fits "the common and popularly accepted" definition of a newspaper. If these stated criteria are not determinative of the question, then Rule 46 is an illusion and Petitioner is acting in an arbitrary and capricious manner by imposing a standard that is so vague as to be meaningless to taxpayers called upon to interpret it at their peril. This is a violation of Respondents' rights to due process and equal protection of the law.[13] These issues were not decided by the Supreme Court of Tennessee.

Respondents also assert at trial and on appeal that they lack sufficient nexus with Tennessee to be liable for Tennessee taxes on their respective mail order sales. *National Bellas Hess v. Illinois Dept. of Revenue*, 386 U.S. 753 (1967). This issue was not decided by the Supreme Court of Tennessee.

Finally, Respondents raised at trial and on appeal the issue of whether a tax on their non-religious publications while exempting certain religious publications under Tenn. Code Ann. § 67-6-323 is an unconstitutional establishment of religion. The Supreme Court of Tennessee correctly observed that this issue would be controlled in

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[13] If *Newsweek*, which was stipulated to fit precisely all four criteria of Rule 46, were held to be an exempt "newspaper", but *Southern Living, Creative Ideas for Living*, and *Progressive Farmer* were held to be non-exempt "magazines", such content-based discrimination as among "newsmagazines" and other "magazines" would be prohibited by *Arkansas Writers'*.

Respondents' favor by this Court's holding in *Texas Monthly, Inc. v. Bullock*. By omitting any discussion of *Texas Monthly*, Petitioner apparently does not disagree with the Tennessee Court's view on this issue.

Thus, even if the issue presented in the Commissioner's Petition were resolved by this Court in his favor, such a ruling would not affect the outcome of this lawsuit, and, for this reason too, this case does not present an appropriate occasion for review on certiorari.

CONCLUSION

For the reasons set forth herein the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX

TENNESSEE CONSTITUTION

ARTICLE I

Sec. 3. Freedom of worship.—That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Sec. 8. General laws only to be passed.—The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

Sec. 19. Freedom of speech and press.—That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of

man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

TENNESSEE CONSTITUTION

ARTICLE XI

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

TENNESSEE CODE ANNOTATED

§ 67-6-323. Religious publications.—The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable activities. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.59 (Williams § 1328.25); T.C.A. (orig. ed.), § 67-3010.]

SALES AND USE TAXES

§ 67-6-329. Miscellaneous exemptions.—(a) The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter:

(1) . . .

(2) . . .

(3) Newspapers . . .

Tenn. Comp. R. & Regs. Tit. 17, Ch. 13-20-5-1-.46

1320-5-1-.46 PUBLISHERS OF NEWSPAPERS, MAGAZINES, PERIODICALS.

(1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of paper and ink used for manufacturing newspapers are sales for further processing and are also exempt from tax.

(2) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must contain matters of general interest and reports of current events.

(3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

(4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

(5) Where subscriptions are placed or accepted for magazines or any other publication published in in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

(6) Publishers of books, loose leaf reports, etc., concerning banking, business, insurance, tax and other similar types of information, law, cases, etc., and concerning events such as contractor activities, social and sports events, credit etc., where there is a general distribution of the same book, report, or other publication, shall be deemed to be dealers, and such books, and other publications shall be subject to the Sales and Use Tax. Where a special report is made, and no general distribution is made of the report, no Sales or Use Tax is due.

(7) The sale or use of shoppers advertisers using newsprint distributed in this state or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper is exempt from tax.

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE

No. 86-933-I

SOUTHERN LIVING, INC.,
Plaintiff,

vs.

KATHRYN BEAHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
Defendant.

STIPULATION

[Filed Sept. 9, 1988]

It is stipulated by the parties that the following matters may be considered by the Court as agreed facts in this case and that such facts existed at all times relevant to the matters at issue herein.

1. The plaintiff, Southern Living, Inc., is a business corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Birmingham, Alabama. The defendant, Kathryn Beahm Celauro, at the time suit was brought, was the duly appointed and serving Commissioner of Revenue of the State of Tennessee. She has been succeeded in office by Dudley W. Taylor, who is now the duly appointed and serving Commissioner of Revenue of the State of Tennessee. It is agreed that the plaintiff may proceed against the defendant, the State of Tennessee, without a formal change of name.

2. On October 8, 1985, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, $1,259,676.88 in full payment of tax, interest and penalties assessed against the plaintiff. Subsequent to October

8, 1985, and prior to filing suit, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, the additional sum of $91,953.91 alleged to be the State's sales and/or use tax. Subsequent to the date of filing suit herein, plaintiff has made further payments of sales and/or use tax to the defendant on subscription sales of its magazines to residents of Tennessee for the period May, 1986 through September, 1987, in the total sum of $163,568.70, for which sums defendant has waived the requirement of filing claim for refund pursuant to T.C.A. § 67-1802(c)(2). A copy of the audit report, notice of assessment and letter of waiver are attached hereto as collective Exhibit "A".

3. The tax deficiencies assessed against plaintiff by defendant and for which plaintiff has made payment to defendant as set forth in paragraph 2 and sued for herein were for sales taxes alleged to be due on the sale by plaintiff of its Periodicals to residents of Tennessee by subscription, pursuant to the taxation of general sales at retail statute, T.C.A. § 67-6-202.

4. Plaintiff is a publisher primarily engaged in the business of selling *Southern Living* and *Creative Ideas For Living* ("plaintiff's Periodicals"), news periodicals produced and distributed on a monthly basis for circulation among the general public, which contain matters of general interest and reports of current events relating to the Southern region of the United States. Plaintiff's Periodicals, when their successive issues are put together, do constitute a book.

5. Plaintiff sells copies of its Periodicals that ultimately come to rest in Tennessee in two ways. First, plaintiff sells to customers within Tennessee by direct subscription obtained by mail order or by solicitations by third parties to customers within Tennessee. Requests for direct subscriptions are mailed by the customer to plaintiff's offices in Birmingham, Alabama, on order forms contained in announcements mailed from outside Tennes-

see or order forms contained in individual issues of Plaintiff's Periodicals. Requests for direct subscriptions are then accepted by plaintiff in Birmingham, Alabama, where all subscription records are kept and all matters relating to subscriptions are directed. Subscriptions to plaintiff's Periodicals are also sold to residents of Tennessee by representatives of QSP, Inc. calling on customers in Tennessee. Formerly this was by contract with Sunland Plans, Inc. which was acquired by QSP, Inc. QSP, Inc. has no direct or indirect ownership with plaintiff. (A copy of the agreement between Sunland Plans, Inc. and Southern Living is attached hereto as collective Exhibit "B".) Sunland Plans, Inc. and QSP, Inc. are marketing companies that simultaneonsly market magazine subscriptions to numerous periodicals including *Southern Living*, by contract with schools and other like organizations. When subscriptions to *Southern Living* are obtained by a representative of an organization acting under contract with Sunland Plans, Inc. or QSP, Inc., the sunbscription forms and a check for the "remit" or net amount due to *Southern Living* is mailed by the marketing company to Southern Living, Inc. and the marketing company retains its agreed upon portion of the subscription price. The marketing company pays the school or other organization the amount due it by agreement, separately negotiated over which Southern Living, Inc. has no knowledge or control. Other than as set forth in the agreement, Southern Living does not have or exercise any direction or control over the marketing company, the organizations it contracts with, or the students who actually solicit subscriptions, nor over the time, manner or means by which such solicitations are made. The subscriptions solicited by representatives of organizations acting under contract with Sunland Plans, Inc. or QSP, Inc. are subject to approval and acceptance by Southern Living, Inc. No further stipulation is intended to be

made concerning the relationship between plaintiff and sales representatives of QSP, Inc. Subscriptions to *Southern Living* are also obtained occasionally by a direct mail marketer such as Ebsco. Although Southern Living does not authorize its publication to be promoted by direct mail marketers, it will accept random subscriptions that occasionally come in that way. Another way in which plaintiff's Periodicals are sold is at wholesale for resale to newstand operators and other vendors. Defendant does not assert that plaintiff owes any tax on sales at retail by newsstand vendors, and accordingly sales by this method are not presently in dispute.

6. Pursuant to contract with plaintiff, Baird-Ward Printing Company, Inc. ("Baird-Ward"), which has no direct or indirect common ownership with plaintiff, receives in Tennessee, paper, subscription labels, and film sent by the plaintiff from Birmingham Alabama (a copy of the contract with Baird-Ward is attached hereto as Exhibit "C"). Pursuant to its contract with plaintiff, Baird-Ward produces plaintiff's Periodicals in the Baird-Ward plant in Nashville, Tennessee, for transmission by U.S. Mail to subscribers within and without Tennessee. Editorial material is produced in manuscript form by Southern Living at its offices in Birmingham, Alabama, reduced to film and the film is mailed to Nashville, Tennessee, where Baird-Ward uses it to make printing plates. The plates are used by Baird-Ward to print *Southern Living* on paper supplied by Southern Living and stored by Baird-Ward on its premises in sufficient quantity to print two issues of *Southern Living*. After printing the copies of *Southern Living* to be mailed to subscribers and affixed to them mailing labels prepared and provided to Baird-Ward by Southern Living's fulfillment office in Birmingham, Alabama. Copies with labels affixed were delivered by Baird-Ward to U.S. mail facilities for mailing to subscribers.

7. Plaintiff does not maintain an office in Tennessee. Plaintiff maintains no sales force in Tennessee and no salesmen employed by plaintiff come into Tennessee for the purpose of seeking subscriptions. Plaintiff employs an advertising salesman who is based in Atlanta, Georgia, and who comes into Tennessee to solicit advertising for *Southern Living* 10 to 12 times each year.

8. Pursuant to T.C.A. § 67-6-329(3), the defendant exempts from imposition of the sales and use tax "newspapers" as described in Tennessee Department of Revenue Regulation § 1320-5-1.46(2). A number of daily and weekly newspapers enjoy this exemption including weekly publications which are sold and delivered as part of the "newspapers." On July 19, 1987, a copy of the *New York Times* Sunday newspaper was purchased at retail from Bookworld, Inc. in Nashville, Tennessee. Included within the *New York Times* newspaper was the *New York Times Magazine* (a copy of which is attached hereto with sales receipt as collective Exhibit "D"). The seller did not charge and the buyer did not pay a state or local sales tax on this purchase. In addition, various publications such as *Parade* (a copy of which is attached hereto as Exhibit "E") and *USA Weekend* (a copy of which is attached hereto as Exhibit "F"), are sold and distributed in Tennessee as part of or supplements to the Sunday editions of newspapers such as *The Tennessean* and the *Chattanooga Times-Free Press*. At the time of purchase and at all times prior thereto which are relevant to this suit, it was the position of the Tennessee Department of Revenue not to impose a tax on such sales, and it has continued to be and is currently the position of the Tennessee Department of Revenue not to impose a tax on such sales. On the same date and place copies of *Newsweek* and *Southern Living* were purchased (a copy of which is attached with sales receipt as collective Exhibit "G"). The seller charged and the buyer paid a state and local sales tax on these purchases. It was then, is now,

and at all times relevant hereto, the position of the Tennessee Department of Revenue that the state and local sales tax was due on the sale of these publications.

9. Attached hereto as collective Exhibit "H" are examples of advertising supplements and other printed matter distributed in Tennessee with newspaper with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales tax was due on the sale of these publications as part of a "newspaper." Attached hereto as collective Exhibit "I" are examples of "shoppers advertisers" with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales or use tax was due if provided without charge.

10. Pursuant to T.C.A. § 67-6-323, the defendant treats as exempt and does not impose a tax on the sale to, use by, or distribution by any church or other religious or charitable institutions of religious publications for use in the customary religious or charitable activities.

11. Pursuant to T.C.A. § 67-6-329(a)(4)(12) and (14), the defendant treats as exempt and does not impose a tax on the sale or use of:

(a) advertising supplements or other printed matter printed in Tennessee and distributed with newspapers (effective 5/17/87);

(b) shopper's advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper, or

(c) school books.

12. It is agreed that collective Exhibit "B" and "C" hereto will be kept confidential by the defendant and will be introduced into Court as part of this Stipulation pursuant to an Agreed Protective Order to be issued by the

Court, sealed and maintained as confidential court records.

November 9, 1987

/s/ Charles A. Trost
Attorney for Plaintiff

/s/ H. Rowan Leathers, III
Attorney for Plaintiff

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE

No. 86-934-II (I)

PROGRESSIVE FARMER, INC.,
Plaintiff,

vs.

KATHRYN BEAHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
Defendant.

STIPULATION

It is stipulated by the parties that the following matters may be considered by the Court as agreed facts in this case and that such facts existed at all times relevant to the matters at issue herein.

1. The plaintiff, Progressive Farmer, Inc. is a business corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Birmingham, Alabama. The defendant, Kathryn Beahm Celauro, at the time suit was brought, was the duly appointed and serving Commissioner of Revenue of the State of Tennessee. She has been succeeded in office by Dudley W. Taylor, who is now the duly appointed and serving Commissioner of Revenue of the State of Tennessee. It is agreed that the plaintiff may proceed against the defendant, the State of Tennessee, without a formal change of name.

2. On October 8, 1985, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, $30,555.67 in full payment of tax, interest and penalties assessed against the plaintiff. Subsequent to October 8,

1985, and prior to filing suit, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, the additional sum of $11,566.52 alleged to be the State's sales and/or use tax. Subsequent to the date of filing suit herein, plaintiff has made further payments of sales and/or use tax to the defendant on subscription sales of its magazine to residents of Tennessee for the period May, 1986 through September, 1987, in the total sum of $22,878.95, for which sums defendant has waived the requirement of filing claim for refund pursuant to T.C.A. § 67-1802(c)(2). A copy of the audit report, notice of assessment and letter of waiver are attached hereto as Exhibit "A".

3. The tax deficiencies assessed against plaintiff by defendant and for which plaintiff has made payment to defendant as set forth in paragraph 2 and sued for herein were for sales taxes alleged to be due on the sale by plaintiff of its periodical, *Progressive Farmer*, to residents of Tennessee by subscription, pursuant to the taxation of general sales at retail statute, T.C.A. § 67-6-202.

4. Plaintiff is a publisher primarily engaged in the business of selling *Progressive Farmer*, a news periodical produced and distributed on a monthly basis for circulation among the general public, which contains matters of general interest and reports of current events relating to farming, agriculture and rural life in the United States. *Progressive Farmer*, when its successive issues are put together, does not constitute a book.

5. Plaintiff sells copies of *Progressive Farmer* that ultimately come to rest in Tennessee by direct subscription obtained by mail order. Requests for direct subscriptions are mailed by the customer to plaintiff's offices in Birmingham, Alabama, on order forms contained in announcements mailed from outside Tennessee or order forms contained in individual issues of *Progressive Farmer* magazine. Requests for direct subscriptions are then accepted by plaintiff in Birmingham, Alabama,

where all subscription records are kept and all matters relating to subscriptions are directed. Subscriptions to *Progressive Farmer* are also sold to residents of Tennessee by representatives of QSP, Inc. calling on customers in Tennessee. Formerly this was by contract with Sunland Plans, Inc. which was acquired by QSP, Inc. QSP, Inc. has no direct or indirect ownership with plaintiff. (A copy of the agreement between Sunland Plans, Inc. and plaintiff is attached hereto as collective Exhibit "B"). Sunland Plans, Inc. and QSP, Inc. are marketing companies that simultaneously market magazine subscriptions to numerous periodicals, including *Progressive Farmer*, by contract with schools and other like organizations. When subscriptions to *Progressive Farmer* are obtained by a representative of an organization acting under contract with Sunland Plans, Inc. or QSP, Inc., the subscription forms and a check for the "remit" or net amount due to Progressive Farmer, Inc. is mailed by the marketing company to Progressive Farmer, Inc. and the marketing company retains its agreed upon portion of the subscription price. The marketing company pays the school or other organization the amount due it by agreement, separately negotiated over which Progressive Farmer, Inc. has no knowledge or control. Other than as set forth in the agreement, plaintiff does not have or exercise any direction or control over the marketing company, the organizations it contracts with, or the students who actually solicit subscriptions, nor over the time, manner or means by which such solicitations are made. The subscriptions solicited by representatives of organizations acting unde contract with Sunland Plans, Inc. or QSP, Inc. are subject to approval and acceptance by Progressive Farmer, Inc. No further stipulation is intended to be made concerning the relationship between plaintiff and sales representatives of QSP, Inc. Subscriptions to *Progressive Farmer* are also obtained occasionally by a direct mail marketer such as Ebsco. Although Progressive Farmer does not authorize its publication to be pro-

moted by direct mail marketers, it will accept random subscriptions that occasionally come in that way. Defendant does not assert that plaintiff owes any tax on sales at retail by newsstand vendors, and accordingly sales by this method are not presently in dispute.

6. Pursuant to contract with plaintiff, Baird-Ward Printing Company, Inc. ("Baird-Ward"), which has no direct or indirect common ownership with plaintiff, receives in Tennessee, paper, subscription labels, and film sent by the plaintiff from Birmingham, Alabama (a copy of the contract with Baird-Ward is attached hereto as Exhibit "C"). Pursuant to its contract with plaintiff, Baird-Ward produces *Progressive Farmer* magazine in the Baird-Ward plant in Nashville, Tennessee, for transmission by U.S. mail to subscribers within and without Tennessee. Editorial materials are produced in manuscript form by plaintiff at its offices in Birmingham, Alabama, reduced to film and the film is mailed to Nashville, Tennessee, where Baird-Ward uses it to make printing plates. The plates are used by Baird-Ward to print *Progressive Farmer* on paper supplied by plaintiff and stored by Baird-Ward on its premises in sufficient quantity to print two issues of *Progressive Farmer*. After printing the copies of *Progressive Farmer* to be mailed to subscribers had affixed to them mailing labels prepared and provided to Baird-Ward by plaintiffs fullfillment office in Birmingham, Alabama. Coipes with labels affixed were delivered by Baird-Ward to U.S. mail facilities for mailing to subscribers.

7. Plaintiff maintains editorial offices in Davidson and Shelby counties in Tennessee with two employees, an editor and a secretary, at each office. Plaintiff maintains no sales force in Tennessee and no salesmen employed by plaintiff come into Tennessee for the purpose of seeking subscriptions. Advertising employees of plaintiff based in Atlanta, Georgia, come into Tennessee from time to time to solicit advertising for plaintiff.

8. Pursuant to T.C.A. § 67-6-329(3), the defendant exempts from imposition of the sales and use tax "newspapers" as described in Tennessee Department of Revenue Regulation § 1320-5-1.46(2). A number of daily and weekly newspapers enjoy this exemption including newspapers including weekly publications which are sold and delivered as part of the "newspapers." On July 19, 1987, a copy of the *New York Times* Sunday newspaper was purchased at retail from Bookworld, Inc. in Nashville, Tennessee. Included within the *New York Times* newspaper was the *New York Times Magazine* (a copy of which is attached with sales receipt as collective Exhibit "D"). The seller did not charge and the buyer did not pay a state or local sales tax on this purchase. In addition, various publications such as *Parade* (a copy of which is attached hereto as Exhibit "E") and *USA Weekend* (a copy of which is attached hereto as Exhibit "F"), are sold and distributed in Tennessee as part of or supplements to the Sunday editions of newspapers such as *The Tennessean* and the *Chattanooga Times-Free Press.* At the time of purchase and at all times prior thereto which are relevant to this suit, it was the position of the Tennessee Department of Revenue not to impose a tax on such sales, and it has continued to be and is currently the position of the Tennessee Department of Revenue not to impose a tax on such sales. On the same date and place copies of *Newsweek* and *Southern Living* were purchased (a copy of which is attached hereto with sales receipt as collective Exhibit "G"). The seller charged and the buyer paid a state and local sales tax on these purchases. It was then, is now, and at all times relevant hereto, the position of the Tennessee Department of Reevnue that the state and local sales tax was due on the sale of these publications.

9. Attachd hereto as collective Exhibit "H" are examples of advertising supplements and other printed matter distributed in Tennessee with newspapers with respect to which it was at all times relevant to this suit

and is now the position of the Tennessee Department of Revenue that no state or local sales tax was due on the sale of these publications as a part of a "newspaper." Attached hereto as Exhibit "I" are examples of "shoppers advertisers" with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales or use tax was due if provided without charge.

10. Pursuant to T.C.A. § 67-6-323, the defendant treats as exempt and does not impose a tax on the sale to, use by, or distribution by any church or other religious or charitable institutions of religious publications for use in the customary religious or charitable activities.

11. Pursuant to T.C.A. § 67-6-329(a)(4)(12) and (14), the defendant treats as exempt and does not impose a tax on the sale or use of:

(a) advertising supplements or other printed matter printed in Tennessee and distributed with newspapers (effective 5/17/87);

(b) shopper's advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper, or

(c) school books.

12. It is agreed that collective Exhibits "B"and "C" hereto will be kept confidential by the defendant and will be introduced into Court as part of this Stipulation pursuant to an Agreed Protective Order to be issued by the Court, sealed and maintained as confidential court records.

November 9, 1987

/s/ Charles A. Trost
Attorney for Plaintiff

/s/ H. Rowan Leathers, III
Attorney for Defendant

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

86-933-I
86-934-II

[Filed Sep. 9, 1988]

SOUTHERN LIVING, INC.,
PROGRESSIVE FARMER, INC.,
Plaintiffs,

-vs-

KATHRYN BEHM CELAURO,
Commissioner of Revenue,
State of Tennessee,
Defendants.

TRIAL PROCEEDINGS
November 13, 1987
Before
Chancellor Irvin H. Kilcrease, Jr.

APPEARANCES:

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Mr. Lee Borden
General Counsel
Southern Progressive

For Plaintiffs

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Nashville, Tennessee 37219

For Defendants

* * * *

[23] A: In Rule 46, number 2, it states, "In order to constitute a newspaper the publication must contain at least the following elements.

"A: It must be published at stated short intervals, usually daily or weekly.

"B: It must not, when its successive issues are put together, constitute a book.

"C: It must be intended for circulation among the general public.

"D: It must contain matters of general interest and reports of current events."

Q: Are these the exclusive criteria approved by the Department of Revenue to determine whether a periodical publication qualifies as a newspaper?

A: These are not the only ones. As the rule states, these are the—it must contain at least these four areas.

Q: What other things might the Department of Revenue consider in determining whether or not a periodical publication qualifies as a newspaper?

A: We try to look at what is the common and ordinary meaning of "a newspaper" or "magazine."

Q: Exactly what do you mean by, "the [24] ordinary meaning of a newspaper or magazine"?

A: Well, for example, does a newspaper contain local advertising? Does it contain comics? Does it contain an obituary section? Does it contain classified ads, advertising, those kinds of things that would normally be classified as "a newspaper" under the common and ordinary meaning of "a newspaper." In other words, a newspaper contains news, instead of just being for entertainment or enjoyment.

Q: So in determining what is the plain and ordinary meaning of the word "newspaper," you can't simply set a hard and fast definition down. It more or less depends on the individual instance; is that correct?

A: That's correct. Each set of circumstances have to be looked at to make those determinations.

Q: Mr. Bracey, why does the Department of Revenue consider the plain ordinary meaning of the word "newspaper" in determining whether or not periodical publications qualify for the newspaper exemption?

A: Because the law specifically exempts newspapers under 67-6-329 and simply states in number [25] 3, "newspapers."

MR. LEATHERS: Your Honor, I would again like to seek Mr. Ehler's assistance in determining what the exhibit numbers are for various exhibits introduced here. First the copy of the Southern Living publication.

CLERK: Marked exhibit G.

MR. LEATHERS: Copy of Creative Ideas For Living publication, the Progressive publication; also included is the copy of the Newsweek publication. I will ask collective exhibit G be handed to Mr. Bracey.

(Above referenced document marked for identification as Exhibit G.)

Q: Mr. Bracey, I would first ask that you put before you the Southern Living publication which is contained within exhibit G. I'd like to ask you just a few questions about that publication.

(Respite). Do you have it in front of you?

A: Yes.

Q: First, we can presume that since we are here in court disputing this issue that the Department has not determined that publication to be a newspaper; is that correct?

A: That's correct, we do not consider it [26]a newspaper.

Q: Why doesn't the Department of Revenue consider such publication qualified as a newspaper?

A: It would certainly not fall under the common and ordinary meaning of "a newspaper."

Q: Is there any other reason why the Department of Revenue might not consider the Southern Living publication to qualify for the newspaper exemption?

A: It is also directed at the Southern states. It's not widely distributed within the United States. It is addressing a segment of the population that is in the Southern states. I might indicate, too, whether it contains matters of general interest and reports of current events. I would say it does not.

MR. TROST: If your Honor please, can I speak to Mr. Leathers?

* * * *

[58] Q: We said it falls within the common and ordinary definition in all respects except one, it has no comics. Are you telling the Court if it has—

A: I will say I will make that determination after reviewing what was in the publication.

Q: You can't tell us right now that you would or would not exempt a publication, otherwise that is a newspaper, simply because they decided to stop running comics?

A: I would look at each case on its own merits and try the make the decision based on what I saw.

Q: And it is your testimony now that in addition to the four criteria set forth in the regulation, there is criteria that you have, such that it must contain local advertising, obituaries, it must contain comics and must contain classified ads, otherwise it does not meet all four of those additional criteria, heretofore unstated anywhere except in your testimony in court, they would not be [59] a newspaper; is that your testimony?

A: It must contain news, instead of just information that is more entertaining and just for entertainment.

Q: Well, what's comics for? Does that bring the news of the world? Do you read Doonesbury to get the news? Some people do.

A: Yes.

Q: Do you?

A: I don't read the local papers.

Q: Are the comics in there for the purpose of news?

A: It could be construed to be.

Q: Do you construe it as news?

A: I don't read the local papers.

Q: Do you construe it as entertainment?

A: It could be, yes, sir.

Q: And you're saying it's necessary that in addition to the news it must also entertain?

A: I'm saying it is part of the criteria.

Q: And absent having entertainment through the form of comics, would it be your opinion that this particular publication could not, in any form, shape or fashion, be classified as a newspaper? Is that your testimony?

[60] A: I think you have to look at—

Q: I'm asking you. I don't have to look at anything. I'm asking you to look at that question and answer the question. If it met all the criteria that you could think of between now and next Thursday, and the only thing lacking was comic strips, would that keep it from being a newspaper?

A: I would say probably not.

Q: All right.

A: But, again, let me say that I would look at each case on its own merits—

Q: Probably?

A: —based on the common and ordinary definition of a newspaper.

Q: In other words, you cannot tell us today that the Nashville Tennessean, which you have said meets all criteria of a newspaper, if they made an editorial decision they will stop paying cartoonists and comic strip writers and put no more comic strips in the newspaper, that they will not thereafter enjoy the exemption? Or is it such a complicated and difficult question you have got to take it and ponder it for awhile?

A: I think we have to look at each situation, based on its own merits. You are asking [61] me hypothetical questions, which I don't have a copy of The Tennessean in front of me.

Q: Have you ever read The Tennessean?

A: Yes. I don't read it on a regular basis.

Q: Do you know it has comics in it?

A: It had when I read it.

Q: And you have said it is classified as a newspaper?

A: Yes, sir.

Q: Now I'm asking you a very simple question. If Gannett, who owns it, made a determination they're going to continue to publish it in all respects like they've been doing for a hundred years, and the only thing that changed is that they're going to quit running comics in it, does that make it, in your opinion, ceases being an exempt newspaper?

A: Again, that is a hypothetical question.

Q: And you can answer it hypothetically.

A: I'm saying you have to look at the common and ordinary definition of "a newspaper."

Q: Are you saying you will not or cannot answer the question?

[62] A: I guess I'm saying what I would like to do is take each case on its own merits and look at the contents of the paper.

Q: And I believe I'm asking you to take that case and view it on its merits right now. Can you answer the question? Would that one simple fact keep it from being a newspaper, the absence of comics?

A: Based on my experience with The Tennessean, I would say it would still probably be classified as a newspaper.

Q: Can I take that as a yes?

A: Yes.

Q: Then is it an accurate statement to say it does not require that all four criteria make it a newspaper?

A: Those are indications that help define what is a common and ordinary definition of "a newspaper."

Q: And we've just determined that at least one of them could be missing and its still be a newspaper; is that correct?

A: You said comics.

* * * *

[86]

CERTIFICATE

STATE OF TENNESSEE

COUNTY OF WILLIAMSON

I, Ray L. Walker, Court Reporter and Notary Public in and for the County of Williamson and the State of Tennessee at Large, do hereby certify that I recorded the foregoing proceedings in machine shorthand: that the witness was first duly sworn, that the proceedings were reduced to typewriting by me, and that the foregoing is a complete and accurate transcript of the said proceedings, to the best of my ability.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of these proceedings.

IN WITNESS WHEREOF, I have hereunto affixed my signature and official seal of office, this 6th day of August 1988, at Brentwood, Williamson County, Tennessee.

/s/ Ray L. Walker
RAY L. WALKER
Notary Public at Large
State of Tennessee

My Commission Expires 3/17/91

[87] The Plaintiff tenders this Transcript of the Proceedings, as ordered an permitted by the Court. The same having been duly approved by counsel and by this Court, the same is signed an ordered to be filed by the Court as part of the record in this cause as such Transcript of Proceedings.

/s/ Irvin H. Kilcrease, Jr.
CHANCELLOR IRVIN H. KILCREASE, JR.

/s/ Charles Trost
CHARLES TROST
Attorney at Law
Attorney for Plaintiff

/s/ Daryl J. Brand
DARYL J. BRAND
State Attorney General
Attorney for Defendant

Filed in the office of the Chancery Court Clerk of Davidson County, Tennessee, at Nashville, this the —— day of ————, 1988.

Chancery Court Clerk

[88]

FILING ATTORNEY'S CERTIFICATE OF FILING AND NOTICE

The undersigned hereby certifies that he has lodged the foregoing transcript of this Proceeding with the clerk of the trial court within the time allowed by law and has sent an exact copy of this certificate and notice of such filing to all other interested parties and/or their attorneys, all pursuant to the Tennessee Code Annotated.

This 8th day of August 1988.

/s/ Charles A. Trost
CHARLES A. TROST
Attorney for Plaintiff

[89]

CHANCELLOR'S CERTIFICATE OF APPROVAL OF THE TRANSCRIPT OF PROCEEDINGS

On the trial of this case, the foregoing was all the evidence submitted to the Court, and no written objections as to the accuracy or authenticity of the Transcript of Proceedings having been filed within ten days of the lodging of the said Transcript of Proceedings with the clerk of the trial court, I hereby certify approval of said Transcript of Proceedings and authentication of the attached exhibits, pursuant to the Tennessee Code Annotated.

WITNESS my signature this —— day of ———— 1988.

CHANCELLOR IRVIN H. KILCREASE, JR.

No. 90-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
and PROGRESSIVE FARMER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF NEWSWEEK, INC.

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Listing Pursuant to Rule 29.1

Respondent Newsweek, Inc. is a wholly-owned subsidiary of The Washington Post Company. The subsidiaries of either company (except wholly-owned subsidiaries) are as follows:

Company	*Place of Incorporation*
Bowater Mersey Paper Company Limited	Nova Scotia
Capital Fiber, Inc.	Maryland
The International Herald Tribune S.A.	France
Los Angeles Times-Washington Post News Service, Inc.	District of Columbia
Bear Island Paper Co.	Virginia (limited partnership)
Bear Island Timberlands Co.	Virginia (limited partnership)

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IN THE

Supreme Court of the United States

October Term, 1990

No. 90-273

COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC., SOUTHERN LIVING, INC., AND PROGRESSIVE FARMER, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF NEWSWEEK, INC.

Statement of the Case

Tennessee purports to apply its sales tax to publications sold or delivered in Tennessee, except that "newspapers" and religious publications[1] are exempt from the tax.

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[1] Because the Tennessee Supreme Court found Tennessee's content-based, discriminatory taxing scheme to violate respondent's right to Freedom of the Press, it did not reach the issue of whether the exemption for religious publications also rendered the tax scheme unconstitutional. In *dicta* that leaves no doubt as to how the Court would act on remand, the Court stated: "Nonetheless we believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 109 S. Ct. 890, _____ L. Ed.2d _____ (1989)." (App. 9).

Although the petitioner stipulated that respondent's[2] weekly publication, *Newsweek*, met all of the criteria defining a "newspaper" set forth in the Tennessee tax regulations (App. 21),[3] petitioner nevertheless denied respondent an exemption from the state tax. Under protest, respondent paid assessed tax, penalty and interest on its subscription sales and sued for refund in the Tennessee Chancery Court. Each of the several issues raised by respondent (see App. 16-17, 26) was decided adversely to it in the Chancery Court.

Relying principally on this Court's decisions in *Minneapolis Star & Tribune* v. *Minn. Com'r. of Rev.*, 460 U.S. 575 (1983) and *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221 (1987), the Tennessee Supreme Court reversed. (App. A).

A Petition for Rehearing was denied by Order entered May 14, 1990. The Petition for Writ of Certiorari was filed on August 10, 1990 and served on respondent's counsel on August 13, 1990.

At trial, petitioner recognized that its discriminatory tax scheme could survive only if it was necessary to promote some compelling state interest. It defended its scheme as necessary "to further freedom of the press and to reduce regulation in the area of the press," and the Chancellor found these reasons to be "sufficiently compelling." (App. 22).

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[2] Respondent, Newsweek, Inc. is one of three respondents named in the petition. It is unrelated either to Southern Living, Inc. or Progressive Farmer, Inc. Newsweek's complaint was tried separately in the Tennessee Chancery Court and is the subject of separate opinions in the Chancery Court and the Tennessee Supreme Court.

[3] All appendix references ("App. ") are to petitioner's appendix, at the page indicated.

On respondent's appeal to the Tennessee Supreme Court, petitioner abandoned the rationale advanced to, and adopted by, the lower court. Instead, petitioner argued that its tax scheme which discriminates in favor of newspapers furthered a compelling public interest "by providing immediate and timely dissemination of information to the public." (App. 7). The Tennessee Supreme Court rejected this freshly-minted assertion of a governmental interest and found the tax scheme invalid under the First Amendment. (App. 7-8).

On the instant petition, petitioner abandons both of its previous attempts to establish a compelling state interest. Indeed, petitioner no longer contends that it can establish *any* compelling state interest and has opted instead to attempt to have its tax scheme judged by a lesser standard.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Question Presented By Petitioner Does Not Identify Any Issue Which Would Properly Be Before The Court If Certiorari Were Granted.

The question presented by petitioner (Petition, p. i) is erroneous in two important respects:

(1) It wrongly assumes that Tennessee's newspaper exemption is content-neutral, although the Tennessee Supreme Court found to the contrary. (App. 5-6). To enjoy the newspaper exemption a publication, *inter alia*, "must *contain* matters of general interest and reports of current events." Tennessee State Sales and Use Tax Regulation 1320-5-1-.46.2d (Rule 46(2)(d)), (App. 45, emphasis added). On its face, the regulation imposes

content-based criteria and was, therefore, properly subjected to the analysis dictated by this Court in *Arkansas Writers'*.

(2) Petitioner presents the question whether, under the Equal Protection Clause, Tennessee's tax scheme must satisfy "strict scrutiny." Petitioner asserts that the Tennessee Supreme Court misapplied "equal protection principles" (Petition, p. 7), and argues that this case affords an opportunity to "clarify" the required "equal protection analysis." (Petition, pp. 8, 15). In fact, the inapplicability of an equal protection analysis is clear.

This Court has made plain in *Minneapolis Star* and *Arkansas Writers'* that, where the press is subject to discriminatory taxation, an equal protection analysis (used, for example, in *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983) (decided two months after *Minneapolis Star* but with no reference to it) or in the dissent in *Minneapolis Star* (460 U.S. at 601, Rehnquist, J.)) must yield to the requirement that the government establish a compelling state interest to rescue an otherwise unconstitutional tax scheme.

Consistent with this Court's precedents, the decision of the Tennessee Supreme Court on the federal question rests solely on First Amendment grounds. (App. 8). This petition presents no opportunity to examine whether the Tennessee Supreme Court misapplied equal protection principles since, appropriately, that Court did not undertake an equal protection analysis[4] at all. Petitioner was required to establish a compelling state interest and failed to do so.

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[4] Thus, "strict scrutiny," a standard drawn from equal protection analysis (see, *Minneapolis Star*, 460 U.S. at 601, Rehnquist J., dissenting) has no role in the present case.

II.

The Tennessee Supreme Court Properly Applied This Court's Precedent In Holding That The Tennessee Sales Tax Scheme Unlawfully Discriminates On The Basis Of Content.

Basing tax status on content "is particularly repugnant to First Amendment principles." *Arkansas Writers'*, 481 U.S. at 229. The Tennessee Supreme Court correctly found that the Tennessee tax regulations, on their face, base tax status on content, and thus run afoul of this Court's decision in *Arkansas Writers'*.

To qualify for the "newspaper" exemption to the Tennessee sales tax, a publication must meet four published criteria. The fourth of these criteria defines the matter which an exempt newspaper "must contain."

Rule 46 of the Tennessee State Sales and Use Tax Regulations (1320-5-1-.46), (App. 45) provides:

> (2) In order to constitute a newspaper, the publication must contain at least the following elements:
>
> (a) It must be published at stated short intervals (usually daily or weekly).
>
> (b) It must not, when its successive issues are put together, constitute a book.
>
> (c) It must be intended for circulation among the general public.
>
> (d) It must contain matters of general interest or reports of current events.

The Tennessee Supreme Court reached the unavoidable conclusion that Rule 46(2)(d), "is not a

content-neutral requirement."[5] (App. 6). Having found content-based discrimination, the Tennessee Supreme Court considered and rejected the state's attempt to identify a compelling state interest based on the proposition that "immediate" dissemination of the news deserves special protection. (App. 7-8).

The Tennessee tax scheme discriminates between "newspapers" and "magazines," exempting the former while taxing the latter. In striking down Arkansas' tax scheme which exempted some magazines based on their content, this Court thereby eliminated Arkansas' differential treatment of newspapers and magazines and observed: "Accordingly, we need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." *Arkansas Writers'*, 481 U.S. at 233. Grasping at this reservation, petitioner urges that the present case is one of first impression, presenting exactly the facts which the *Arkansas Writers'* decision did not reach. (Petition, pp. 8-9). Petitioner is wrong.

Arkansas Writers' prohibits *any content-based* discrimination, whether among periodicals of the same type or "between different types of periodicals." This Court was unequivocal in stating that " . . . official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." 481 U.S. at 230. Since Tennessee's discriminatory tax scheme *is* content-based, its unconstitutionality is already established by this Court's precedent. There is no need to invoke "an additional basis for invalidating the sales tax,

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[5] Nowhere in fifteen pages of argument does petitioner challenge the accuracy of this finding.

as applied to the press." *Arkansas Writers'*, 481 U.S. at 233.

III.

The Tennessee Supreme Court Applied The Proper Standard; Even If Tennessee's Discriminatory Tax Scheme Were Content-Neutral, Petitioner Still Must Establish A Compelling State Interest.

The Tennessee Supreme Court properly found that there was no compelling state interest to support a tax which discriminated between "newspapers" and "magazines" on the basis of content. (App. 8). Petitioner now asserts, contrary to fact, that its discrimination between "newspapers" and "magazines" is content-neutral, and therefore the State need not meet the heavy burden of establishing a "compelling state interest."[6] (Petition at i, 10-11, 13).

This argument is at odds with both *Minneapolis Star* and *Arkansas Writers'*. This Court established in *Minneapolis Star* that

> [d]ifferential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

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[6] We emphasize that petitioner nowhere asserts that there is, in fact, a compelling state interest. The closest petitioner comes is to assert a "widely held and logical view that newspapers have historically served, and continue to serve, some important public purpose separate and different from the functions of magazines and other forms of expression." (Petition, p. 10). This "important public purpose" is nowhere identified, nor is the State's interest in subsidizing it explained.

460 U.S. 575 at 585. The Court added that "[a] tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. 575 at 592-93. Minnesota was required to meet this heavy burden even though its discriminatory taxing scheme did not depend upon content. In *Arkansas Writers'*, where the taxing scheme did discriminate on the basis of content, the State faced the same heavy burden.

> Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *See Minneapolis Star*, 460 U.S., at 591-592.

481 U.S. at 231.

Thus, even if Tennessee's taxing scheme were erroneously seen as content-neutral, the scheme "burdens rights protected by the First Amendment," *Minneapolis Star*, 460 U.S. at 582, and petitioner faces the same heavy burden. The Tennessee Supreme Court applied the correct standard in ruling that petitioner had not met its burden. This ruling—that petitioner had not met its burden—is not challenged in the petition, and the standard applied by the Tennessee Supreme Court is mandated by this Court's decisions.

IV.

The Tennessee Tax Scheme, As Applied, Arbitrarily Singles Out Members Of The Press To Tax And Is Therefore Unconstitutional.

In *Minneapolis Star*, this Court said that

> recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

460 U.S. at 592.

Tennessee's tax regulations provide that publications will pay no sales tax if they are published at stated short intervals, if they do not constitute a book when successive issues are put together, if they are intended for circulation among the general public, and if they contain matters of general interest or reports of current events. (Rule 46, App. 45).

Petitioner has stipulated (App. 21) that *Newsweek* meets all four of the Rule 46 criteria. Nevertheless, petitioner has singled out respondent to pay tax, penalty and interest on its subscription sales of *Newsweek*, while exempting other publications which similarly satisfy the criteria of Rule 46. No interest suggested by Tennessee can justify exemption of only some of the publications which meet its stated exemption criteria.

Petitioner argued to the Tennessee Supreme Court that the legislature could favor the timely and immediate dissemination of news. The Court found this not to be a compelling state interest, finding no basis to give "immediate news a privileged position." Moreover, even if favoring "immediate" news were thought to represent a compelling state interest, the Tennessee tax scheme does not further that interest. As the Tennessee Supreme Court observed, "*Newsweek* publishes as frequently as many exempt newspapers," (App. 7, 8) and thus provides "immediate" news.

Abandoning its "timely and immediate dissemination" rationale, petitioner now argues the following:

> A distinction between newspapers and magazines based upon the differing production, marketing, and distribution operations of the respective publishing businesses, and upon the physical character, format, and "shelf-life" of their products, would not refer to the content, much less the viewpoint, of the publications themselves. (Petition, p. 10).

Whether, in the abstract, these distinctions could justify discriminatory taxation is irrelevant, because these distinctions are not applied in Tennessee. Tennessee's tax regulations have nothing to do with such things as "distribution operations" or "shelf-life." Only Rule 46 criteria establish the "exempted" class, but not all publications which meet the criteria are granted the exemption.

Because there is no legitimate state interest in singling out *Newsweek*, *Minneapolis Star* compels the result reached by the Tennessee Supreme Court.

V.

This Court Should Not Grant Certiorari Because The Tennessee State Supreme Court's Holding Is Based On An Adequate And Independent State Ground.

In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Id.* at 1038, (*quoting Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)).

Completely separate analyses of the state and federal issues are not required:

> ... even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. *New York City* v. *Central Savings Bank*, 306 U.S. 661, explained in *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556-7; *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52.

Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487, 491-2 (1965).[7]

The holding of the Tennessee Supreme Court in the present case rests on independent and adequate state grounds. That court held that the Tennessee tax scheme violated both "the First Amendment to the United States Constitution and Article 1, Sec. 19 of the Tennessee Constitution."[8] The fact that the state and federal analyses were done together does not taint the independence of the state ground of decision.

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[7] *But see New York* v. *Class*, 475 U.S. 106 (1986), which held that a New York Court of Appeals decision, which merely cited the State Constitution in its holding, did not offer an independent state ground. The New York Court of Appeals holding reviewed in *New York* v. *Class*, however, did not clarify whether the state constitutional right relied on in its state-based holding was to be construed more broadly than the corresponding federal right. Thus, the New York Court of Appeals left unclear whether it felt compelled to rule as it did because it "believed that federal law required it to do so," *Michigan* v. *Long*, 463 U.S. at 1041.

[8] *Southern Living, Inc.* v. *Celauro*, (App. 12) addressing an issue identical to that raised below by respondent. Compare App. 16 and App. 29.

In Tennessee, the Federal Constitution establishes only the minimum guarantees granted under the Tennessee Constitution. The Tennessee Supreme Court reiterated in the present cases that the "Tennessee Constitution Article 1, Section 19 should be construed to have a scope *at least as broad* as that afforded those freedoms by the First Amendment of the United States Constitution. *Leech v. American Book Sellers Ass'n, Inc.*, 582 S.W.2d 736, 745 (Tenn. 1979)." [9] Thus, the Tennessee Supreme Court has provided an independent and adequate state basis for its decision which would be unimpeached by any action of this Court on the federal question.

VI.

There Are No Special And Important Reasons For Granting The Petition

On this petition, no decision of a United States Court of Appeals is implicated, and each state court which has considered the issues raised in the petition has decided those issues in a manner consistent with the decision of the Tennessee Supreme Court.[10] The questions presented

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[9] *Southern Living, Inc.* v. *Celauro*, (App. 14, emphasis added). Accordingly, this is not a case where the federal right was the standard for measuring the bounds of the state right. *See Kentucky* v. *Stincer*, 482 U.S. 730 (1987) (no independent state ground exists when the "[state] court gave no indication that respondent's rights under . . . the Kentucky Constitution were distinct from or broader than, respondent's rights under the Sixth Amendment." *Id.* at 735-6); *Maryland* v. *Garrison*, 480 U.S. 79, 83 (1987) (no independent ground exists where the state court holds the State Constitution to be *in pari materia* with the Federal Constitution).

[10] *Louisiana Life, Ltd.* v. *McNamara*, 504 So.2d 900 (La. Ct. App. 1987); *McGraw-Hill, Inc.* v. *State Tax Comm'n.*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (N.Y. App. Div. 1989), aff'd 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (1990); *Hearst Corp.* v. *Director of Revenue*, 779 S.W.2d 557 (Mo. 1989); *Dow Jones & Co.* v. *State ex rel Oklahoma Tax Comm'n.*, 787 P.2d 843 (Okla. 1990); *Dep't. of Revenue* v. *Magazine Publishers of America*, No. 75,201 (Fla. May 31,

(Note continued on following page)

in this petition have been settled by this Court's decisions in *Minneapolis Star* and *Arkansas Writers'*, and the holdings in those cases were correctly applied by the Tennessee Supreme Court.

Accordingly, there is no basis pursuant to Rule 10 of this Court's rules for granting the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 90-273

In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
and PROGRESSIVE FARMER, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

I. THE SUPREME COURT OF IOWA HAS DECIDED THE ISSUE PRESENTED BY THE PETITIONER IN A WAY THAT DIRECTLY CONFLICTS WITH THE TENNESSEE DECISIONS.

The court of last resort of the State of Iowa has decided precisely the issue presented by the Petitioner here in a way that directly conflicts with the Tennessee Supreme Court's decisions in these cases. *Hearst Corp. v. Iowa Dept. of Revenue and Finance*, No. 268/89-1863 (Iowa, Sept. 19, 1990) (reprinted as Appendix hereto). In a case virtually identical to these cases, the Iowa Supreme Court

upheld that State's distinction, for tax exemption purposes, between "newspapers" and "magazines," against First Amendment and equal protection challenges.

This direct conflict between state supreme courts on the federal constitutional issue presented here underscores the critical need for decision of the issue by this Court.

II. THE TENNESSEE SUPREME COURT BASED ITS DECISIONS ON THE FIRST AMENDMENT, AND NOT ON ANY INDEPENDENT STATE GROUND.

The Respondents charge that the decisions of the Tennessee Supreme Court in these cases were based upon an independent state ground (i.e., the free speech and free press provisions of Tenn. Const., Art. I, §19). The Respondents' assertion is belied by the very language of the Tennessee Supreme Court.

In its *Newsweek* opinion, the Tennessee Supreme Court never even mentioned the Tennessee Constitution except in a rote statement of the issues argued by the appellants. Instead, the Tennessee court stated the parameters of its decision as follows:

> We look initially to the constitutional claims charging violation of plaintiff's *first amendment* guarantees of freedom of the press and freedom of expression. *These claims are dispositive* if found against the State.

Newsweek, Inc. v. Celauro, 789 S.W.2d 247, 248 (Tenn. 1990) (emphasis added).

The Tennessee court's analysis in *Newsweek* did not refer to a single decision under Tennessee law, but instead focused entirely on the decisions of this Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project. Inc. v. Ragland*, 481 U.S. 221 (1987). *Newsweek*, 789 S.W.2d at 248-250. Without reference to state law, the Tennessee court plainly and clearly proclaimed that "[W]e hold

therefore the tax is invalid *under the First Amendment.*" *Newsweek*, 789 S.W.2d at 250 (emphasis added). Therefore, the Tennessee court not only refused to make a plain statement that its decision rested on adequate and independent state grounds, but repeatedly emphasized that its holding was based upon federal law.

Similarly, in *Southern Living*, the Tennessee court's decision was based upon the First Amendment rather than upon state law. Indeed, the state court emphasized that

> *We have not addressed the constitutional issues under the free-press provisions of the Tennessee constitution* because we have previously expressed the opinion that the Tennessee Constitutional provisions assuring protection of speech and press, Tennessee Constitution Article I, Sec. 19, should be construed to have a scope at least as broad as that afforded those freedoms by the First Amendment of the United States Constitution. [Citation omitted].

Southern Living, Inc. v. Celauro, 789 S.W.2d 251, 253 (Tenn. 1990) (emphasis added).

As in *Newsweek*, the analysis of the Tennessee court in *Southern Living* focused entirely on First Amendment decisions by this Court, in particular the *Minneapolis Star* decision. *Southern Living*, 789 S.W.2d at 252-253. Although the Tennessee court suggested that state constitutional law is at least as broad as the First Amendment, it gave no indication whatsoever that state law would invalidate the challenged tax statutes even if the First Amendment analysis turned out to be incorrect. The mere citation of the state constitutional provision does not clearly and plainly establish that provision as an independent state ground. *See New York v. Class*, 475 U.S. 106, 109-110 (1986), cited in footnote 7 of Respondent Newsweek, Inc's brief, a footnote which rebuts the text of Newsweek's argument.

Far from making a "plain statement" that its decisions turned on independent state grounds, the Tennessee

Supreme Court made it clear that its holdings were based on the First Amendment and federal court decisions.

III. THE WHOLESALE REJECTION OF THE *TAXATION WITH REPRESENTATION* DECISION BY THE TENNESSEE COURT AND THE RESPONDENTS HIGHLIGHTS THE NEED FOR PLENARY REVIEW OF THESE CASES.

In arguments which go to the merits of these cases, rather than the question of the importance of the issue presented, the Respondents argue at great length that the decisions of the Tennessee Supreme Court were correct. The Respondents' arguments, however, underscore the degree of confusion and conflict in the interpretation by the Tennessee court of prior decisions of this Court.

For instance, the Tennessee court completely denied any applicability of *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), erroneously dismissing that decision as having "little or nothing to do with the abridgement of freedom of speech or of the press contained in the First Amendment." *Southern Living*, 789 S.W.2d at 252. However, in *Taxation with Representation*, this Court reiterated its rejection of the argument that First Amendment rights are violated unless subsidized by the state, and squarely rejected the view that "strict scrutiny" applies whenever some speech, but not all speech, is subsidized by a tax exemption. *Taxation with Representation*, 461 U.S. at 546, 548.

As if seeking to compound the Tennessee court's error, Respondent Newsweek, Inc., argues that the equal protection analysis of *Taxation with Representation* "must yield" to a compelling state interest test whenever the press is subject to "discriminatory taxation." Newsweek Brief at 4.

By arguing that the analysis of *Taxation with Representation* "must yield" to the factually limited holdings of *Minneapolis Star* and *Arkansas Writers'*, the Respondents argue in essence that *Taxation with Representation* must be

overruled or, even more, that that decision has already been overruled *sub silentio*. The hard-line position of the Respondents, that any disparate tax treatment of different types of businesses within the communications media must be supported by "compelling state interests," leaves no room to reconcile *Taxation with Representation* with the *Minneapolis Star* and *Arkansas Writers'* decisions. On the other hand, the Petitioner's position recognizes that compelling state interests must justify a tax system which "singles out" the press by imposing taxes not generally applicable to other businesses, or that specifically targets individual publications for unique tax burdens, but that a "rational basis" analysis applies to tax laws which do not coerce, censor, suppress, or invidiously "target" free expression. Unlike the Respondent's argument, the Petitioner's view attempts to reconcile the holdings of *Taxation with Representation*, *Minneapolis Star*, and *Arkansas Writers'*.

By challenging the validity of this Court's decision in *Taxation with Representation*, the Respondents have reinforced the need for review of the present cases by this Court. The states and the state courts need guidance as to the proper constitutional analysis by which to gauge tax systems touching upon alleged First Amendment interests.

IV. PETITIONER HAS PROPERLY STATED THE QUESTION AS TO THE APPROPRIATE CONSTITUTIONAL ANALYSIS OF A FACIALLY CONTENT-NEUTRAL STATUTE.

The Respondents again argue to the merits, rather than addressing the appropriateness of certiorari, when they criticize the Petitioner's description of the statute challenged in these cases as "content-neutral." Clearly, however, the statute challenged in these cases, Tenn. Code Ann. § 67-6-329(a), is on its face content-neutral. The pertinent language of that section provides:

> The sale at retail, the use, the consumption, the distribution and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter:
>
> . . .
>
> (3) Newspapers.

Tenn. Code Ann. § 67-6-329(a).

The Tennessee Supreme Court has held that the exemption provided by that section must be enforced consistent with the "common and popularly accepted usage" of the term "newspaper." *Shoppers Guide Publishing Co. v. Woods*, 547 S.W.2d 561, 563-564 (Tenn. 1977). Clearly, Tenn. Code Ann. § 67-6-329(a)(3) does not define "newspapers," much less provide a content-based definition. The common usage of the term "newspaper" most often refers to the form, function, and physical character of the publication, not to its content or viewpoint. *See Hearst Corp.*, slip op. at 17-18 (App. 15-16); *Redwood Empire Publishing Co. v. State Board of Equalization*, 207 Cal. App. 3d 1334, 255 Cal. Rptr. 514, 516-518 (1989). Indeed, if the term "newspaper" were construed as being inherently content-based, and thus constitutionally suspect, the validity of numerous other laws, federal as well as state, would be called into serious question. *See e.g.* 15 U.S.C. §§1801-1804 (the "Newspaper Preservation Act"). *See also*, Brief of Amici Curiae at 8-9.

The determinative factor in statutory construction is legislative intent. Legislative enactments must be presumed to be constitutional. *Taxation with Representation*, 461 U.S. at 547-548; *Mitchell v. Mitchell*, 594 S.W.2d 699, 702 (Tenn. 1980). The presumptive constitutionality of legislative intent cannot be destroyed by the mere opinions of witnesses or administrative interpretation, but only by evidence of an unconstitutional purpose or effect of the statute itself. In the present cases, the Tennessee court's assertion that Tennessee's tax system was not

content-neutral was circularly grounded on its misinterpretation of the *Arkansas Writers'* opinion as holding that *any* distinction between segments of the press is *per se* content-based, and thus violates the First Amendment unless supported by compelling justification. *Newsweek*, 789 S.W.2d at 249-250. The very finding of a content-based distinction was thus based on misinterpretation of federal constitutional principles.

The Petitioner has fairly stated an important question deserving review by this Court; whether a state tax exemption statute, which is content-neutral on its face and which distinguishes between different segments of the communications media, must satisfy strict scrutiny.

V. ISSUES PRETERMITTED BY THE TENNESSEE SUPREME COURT WOULD NOT NECESSITATE THE SAME RESULT ON REMAND.

Respondents Southern Living, Inc., and Progressive Farmer, Inc., argue that they would prevail on remand because of the alleged unconstitutionality of Tenn. Code Ann. § 67-6-323. Notably, Newsweek, Inc., did not raise this issue on its appeal to the Tennessee Supreme Court, and the issue would not be available to Newsweek on a remand. *Newsweek*, 789 S.W.2d at 250.

The Respondents rely upon *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890 (1989) to argue that Tenn. Code Ann. § 67-6-323 amounts to an unconstitutional establishment of religion. The Tennessee Supreme Court considered the issue pretermitted. *Southern Living*, 789 S.W.2d at 253. Therefore, any comments made by the Tennessee court regarding *Texas Monthly* were plainly no more than dicta.

The Petitioner would contend that Tenn. Code Ann. § 67-6-323 is sufficiently broad to be constitutional under *Texas Monthly*. Even if Tenn. Code Ann. § 67-6-323 were invalid under the *Texas Monthly* test, the Tennessee Supreme Court has indicated that a question remains as

to whether the Respondents would be entitled to exemption on that ground. *Southern Living,* 789 S.W.2d at 253.

Contrary to the representations of the Respondents, they likely would not prevail on a remand to the Tennessee Supreme Court. The crucial issue in these cases is the question presented by the petition for certiorari.

VI. SPECIAL AND IMPORTANT REASONS SUPPORT THE GRANTING OF REVIEW IN THESE CASES.

The issue presented by these cases is an important constitutional question which has not been and needs to be settled by this Court. The issue has not been settled by the *Minneapolis Star* and *Arkansas Writers'* decisions, but was expressly reserved by this Court. *Arkansas Writers',* 481 U.S. at 233. Similar statutes in numerous other states are placed in jeopardy by the Tennessee Supreme Court's analysis and decisions in these cases. *See* Petition at 6-7, n.1. The courts of the several states are in direct conflict on the question whether tax statutes and other laws can constitutionally differentiate between segments of the communications media. *See Hearst Corp.;* Brief of Amici Curiae at 4-5. The difficulty on the part of state courts in determining what is meant by "content-based" and "content-neutral" in the First Amendment and equal protection contexts is evidenced by the conflicting interpretations, by those courts and by the parties in these cases, of this Court's decisions in *Taxation with Representation, Minneapolis Star,* and *Arkansas Writers'*. For all of these reasons, the Petitioner submits that review of these cases is necessary and appropriate.

CONCLUSION

For the reasons set forth above, and in the Petition for Writ of Certiorari, the Commissioner of Revenue of the State of Tennessee respectfully submits that a writ of

certiorari should issue to review the decisions of the Supreme Court of Tennessee in these cases.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 268 / 89-1863

Filed September 19, 1990

HEARST CORPORATION,

Appellant,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellee.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Appeal from trial court order affirming the Iowa Department of Revenue and Finance's assessment of sales and use tax on Hearst's publications based on their classification as "magazines" rather than being tax exempt as "newspapers". AFFIRMED.

John V. Donnelly and Harold N. Schneebeck of Brown, Winick, Graves, Donnelly, Baskerville, and Schoenebaum, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Lucille M. Hardy, Assistant Attorney General, for appellee.

Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Andreasen, JJ.

SNELL, J.

Appellant, The Hearst Corporation (Hearst), appeals from an adverse ruling of the district court. The district court affirmed the decision of the Iowa Department of

Revenue and Finance (department), holding that the taxed publications of Hearst are not "newspapers" as that undefined term is used in Iowa Code section 422.45(9) (1977) and, therefore, do not qualify for an exemption to Iowa's sales and use tax; that the tax on Hearst's publications is not in violation of the freedom of speech and press provisions of the First Amendment to the United States and Iowa Constitutions; that the tax does not violate the equal protection provisions of the United States and Iowa Constitutions; that the tax is not in violation of the due process provisions of the United States and Iowa Constitutions; that the tax does not violate the commerce clause to the United States Constitution; that Hearst is not entitled to the award of attorneys' fees; and that Hearst is liable for the penalty authorized pursuant to Iowa Code section 423.18 (1983).

I. Background Facts and Proceedings.

Hearst is a Delaware corporation with its principle place of business located in New York, New York. Hearst, among other things, is engaged in the publication and sale of various publications to subscribers and vendors throughout the United States. There are fourteen Hearst publications involved in this case, each of which has a large subscription circulation throughout the United States. These publications are Colonial Homes, Cosmopolitan, Country Living, Good Housekeeping, Harper's Bazaar, Motor, House Beautiful, Motor Boating and Sailing, Popular Mechanics, Science Digest, Sports Afield, Town and Country, Connoisseur, and Redbook.

Between October 1, 1978, and December 31, 1982 (the period in question), Hearst solicited subscription orders by United States mail for its publications from Iowa residents. All subscription solicitations by Hearst originated outside of the State of Iowa, were accepted or rejected by Hearst outside of the State of Iowa, were printed outside of the State of Iowa, and were sent by second class mail directly to Iowa subscribers from points originating outside of the State of Iowa. All of the publications in question were published monthly, except for Colonial Homes which was published bimonthly. During the period in question Hearst collected no Iowa use tax from its Iowa subscribers.

On April 25, 1984, the department issued a notice of assessment for retail use tax relating to the Hearst Corporation's alleged retail use tax liability. This assessment reflects the department's determination that the use tax was due from Hearst by reason of Hearst's failure to collect use tax from its Iowa subscribers for the various publications published by Hearst and sold by subscription to Iowa residents. Hearst filed a timely protest to the assessment with the hearing officer of the department.

On October 27, 1987, a hearing was held before an administrative law judge. In a proposed order, issued July 6, 1988, the administrative law judge upheld the department's assessment for retail use tax. On July 21, 1988, Hearst appealed the proposed order to the director of the department. The director affirmed the proposed order and adopted it in its entirety. Thereafter, on September 23, 1988, Hearst filed a timely petition for judicial review of the director's order with the clerk of the district court for Polk county. The matter was then submitted to

the Iowa District Court for Polk County on September 26, 1989, on the record made before the administrative law judge, written briefs, and oral arguments. The district court issued its ruling on November 6, 1989, holding adversely to Hearst and Hearst appeals. We affirm.

II. Scope of Review.

The court may review the decision of the district court pursuant to Iowa Code section 17A.20 (1989), which provides that:

> An aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court under this chapter by appeal. The appeal shall be taken as in other civil cases, although the appeal may be taken regardless of the amount involved.

Furthermore, pursuant to Iowa Code section 17A.19(8):

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action if substantial rights of the petitioner have been prejudiced because the agency action is:
>
> a. In violation of constitutional or statutory provisions;
>
> b. In excess of the statutory authority of the agency;
>
> . . . .
>
> e. Affected by other error of law;
>
> . . . .

> g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

The scope of this review is at law, not de novo, therefore we are limited to those issues considered in the record made before the agency. *Hussein v. Tama Meat Packing Corp.*, 394 N.W.2d 340, 341 (Iowa 1986); *Taylor v. Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985).

Hearst challenges the agency action based on the above-enumerated provisions.

III. The Taxation Scheme.

Under Iowa's sales and use taxation scheme, a sales tax is imposed on the retail sales of magazines while retail sales of "newspapers" are exempt from taxation. *See* Iowa Code §§ 422.43, 422.45(9) (1977); *see also* Iowa Code § 423.4(4) (1977).

Iowa Code section 422.43 (1977) provides in part that:

> There is hereby imposed a tax of three percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users. . . .

The Code, pursuant to section 422.45(9) (1977), further provides that:

> There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it the following:

> 9. Gross receipts from the sales of newspapers, free newspapers or shoppers guides and the printing and publishing thereof.

Likewise, the "use" of such tangible personal property is exempt from Iowa use tax by virtue of Iowa Code section 423.4(4) (1977) which also provides in part that:

> The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:
>
> 4. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45. . . .

When interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Our goal then, is to ascertain that intent and, if possible, give it effect. *Isaacson v. Iowa State Tax Comm'n*, 183 N.W.2d 693, 695 (Iowa 1971). To ascertain the legislative intent we must look to what the legislature said, rather than what it should or might have said. *State v. Hesford*, 242 N.W.2d 256, 258 (Iowa 1976). Words are given their ordinary meaning unless defined differently by the legislature or possessed of a particular and appropriate meaning in law. *Id.* However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Weight should be given to the department's interpretation of the statutes, particularly when they are of long standing, but the court is not bound by that interpretation. *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 473 (Iowa 1983).

It is the contention of the Hearst Corporation that its publications fall within the purview of the "newspaper" exemption of Iowa Code sections 422.45(9) (1977) and 423.4(4) (1977). Otherwise, Hearst argues, the tax is discriminatory and cannot withstand constitutional challenges.

IV. Are the Subject Publications "Newspapers?"

Whether the Hearst publications may be considered "newspapers" depends upon the meaning of that term as it is used in Iowa Code section 422.45(9) (1977), a tax exemption statute that must be strictly construed against the taxpayer and in favor of taxation. *Goergen v. State Tax Comm'n*, 165 N.W.2d 782, 786 (Iowa 1969). The term "newspaper" is not defined in the statute. In fact, the department was without a rule defining the term until January 28, 1981, when it adopted the following definition:

> A newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest.

701 Iowa Admin. Code 18.42(1) (1981) (amended 1982 striking "generally" from definition); *see also Webster's Third New Int'l Dictionary* 1524 (1976) (defining "Newspaper" in exactly the same terms).

Webster's Third New International Dictionary defines a "magazine" as "a periodical containing special material directed at a group having a particular hobby,

interest or profession. . . . " *Id.* at 1357. The dictionary also defines a "periodical" as "a magazine or other publication of which the issues appear at stated or regular intervals – usu. used of a publication appearing more frequently than annually but infrequently used of a newspaper." *Id.* at 1680.

Hearst itself has made a distinction between its publications, apparently based on common parlance. Its advertisements state that "Hearst is more than 135 businesses including magazines, broadcasting, newspapers, books, business publishing and cable communications." Hearst lists the publications in question here as "magazines" and separately enumerates the newspapers it publishes. These distinctions, that track with the dictionary meanings, must have been accepted by Hearst as having sufficient clarity of meaning for use in communicating with the general public.

The administrative agency also found the Hearst publications in question to be different from newspapers in that they were printed monthly or bimonthly. They were more costly, had a substantially longer useful life than newspapers, and targeted a smaller audience that was interested in a specific subject matter. Also, their format was different as was the paper used in its printing.

We agree that the administrative agency had substantial evidence to support its finding based on these facts and the ordinary meaning of these terms that the Hearst publications are properly classified as "magazines" or "periodicals" and not "newspapers". To classify the Hearst publications as "newspapers" would be to place a

strained, impractical or absurd construction upon the language of the statute. *Doe,* 251 N.W.2d at 501.

Hearst contends that this finding, that its publications are not "newspapers" based on form, is illusory and that their publications are in fact being unconstitutionally discriminated against based on their content. In support of its contention, Hearst offered several exhibits including such publications as Barrons and The Sporting News. Hearst argues that their publications meet all of the noncontent criteria of the "newspaper" exemption of Iowa Code section 422.45(9) (1977), but yet are taxed as nonnewspapers, that the distinctions being drawn by the statute are in fact based upon the content of the publication and not its form. We find no merit to this contention.

Although their status is not before this court, publications such as Barrons and The Sporting News, have been classified by the department as nonnewspapers for purposes of the Iowa Code section 422.45(9) (1977) tax exemption. We observe that although a publication may contain some of the noncontent criteria that distinguish a "newspaper" from other publications that are taxable, it may still not qualify under the "newspaper" exemption. Our review of the facts of this case points to this conclusion.

The agency properly found numerous differences between the Hearst publications at issue and newspapers based on their noncontent factors, as herein enumerated. In addition, there is no evidence in the record to support a finding that the legislature meant to include "magazines" or "periodicals" within its definition of "newspaper." We may glean from the fact that since the

legislature adopted the Webster definition of "newspaper" for purposes of determining what publications qualify for the Iowa Code section 422.45(9) (1977) tax exemption, that it was also the intention of the legislature to exclude from that exemption all other publications – such as "magazines" or "periodicals" as defined by Webster's – since not specifically set out in the statute as exempt. Accordingly, we hold the Hearst publications do not qualify for the Iowa tax exemption.

V. Hearst's Constitutional Challenges.

At the outset we must recognize the presumption of constitutionality of these statutes. The rule is well settled that "a statute will not be declared unconstitutional unless it clearly, palpably, and without doubt infringes the constitution." *Zilm v. Zoning Bd. of Adjustment*, 150 N.W.2d 606, 609 (Iowa 1967). We have also said in various ways that every reasonable doubt must be resolved in favor of constitutionality. *Hansen v. Haugh*, 149 N.W.2d 169, 174 (Iowa 1967).

A. Freedom of Speech, or of the Press.

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This amendment, of course, is made applicable to the several states through the Fourteenth Amendment. Section 7 of article I of the Iowa Constitution similarly provides. The language of the first amendment clearly "does not prohibit all regulation of the press." *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369, 75 L.

Ed. 2d 295 (1983). In fact, it is beyond dispute that some publications may be subjected to generally-applicable economic regulations by the states and the federal government without creating constitutional problems. *Id.* Problems arise, however, when "a discriminatory tax on the press burdens rights protected by the first amendment." *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 227, 107 S. Ct. 1722, 1726, 95 L. Ed. 2d 209 (1987) (footnote omitted). The Court makes it clear in both *Minneapolis Star* and *Arkansas Writers' Project* that a scheme of taxation which differentiates between media sources of the same type will not pass muster under the first amendment unless a compelling justification for the differential treatment exists. For example, a sales tax on cable television service but not on decoders for unscrambling satellite television broadcasts was held to violate first amendment protections. *Medlock v. Pledger,* 785 S.W.2d 202, 204 (Ark. 1990). Here the court also declined to apply first amendment principles so broadly as to hold that all mass media must be taxed in the same way. The argument that newspapers and magazines, that were not taxed, should be categorized with cable television service, was not directly at issue before the court but was inferentially spurned. In the case at bar, unlike *Medlock,* we are faced with a statutory scheme of taxation that differentiates not between media sources of the same type, but between media sources of different types. *See also Austin v. Michigan Chamber of Commerce,* ___ U.S. ___, ___, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652 (1990), where the compelling reason of preventing corruption in the political arena justified the statutes's restrictions.

Appellant Hearst vigorously contends that the distinction between types of media sources is inconsequential and that the Court's decisions in *Minneapolis Star* and *Arkansas Writers' Project* nevertheless control in the present case. We disagree.

In *Minneapolis Star,* the Minnesota Legislature imposed a special "use tax" on the cost of paper and ink products consumed in the production of a publication. This legislation was later amended to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication a $4,000 annual tax credit. The net effect of these provisions was that only a handful of publishers were actually subject to the ink and paper tax. *Minneapolis Star,* 460 U.S. at 578-79, 103 S. Ct. at 1368.

The Supreme Court, in rejecting the state's argument that the tax was valid, found two distinct forms of discrimination. First, as opposed to a generally-applicable economic regulation, such as Iowa's, to which the press can legitimately be subject, the Minnesota Legislature created a special tax that applies only to certain publications protected by the first amendment. *Id.* at 581, 103 S. Ct. at 1370. Second, the tax was tailored in such a way that it singled out and targeted a small group of newspapers. *Id.* at 591, 103 S. Ct. at 1375. In holding that such a differential and discriminatory scheme of taxation is invalid under the first amendment, the court noted that:

> A power to tax differently, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not

> fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585, 103 S. Ct. at 1371-72 (citations omitted). The Court also found great potential for abuse if it recognized a power in the state to tax selected members of the press. *Id.* at 592, 103 S. Ct. at 1375. *Cf. Village Publishing Corp. v. North Carolina Dep't of Revenue*, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 710 (1985) (Justice White dissenting from dismissal of appeal for want of a substantial federal question); *Department of Revenue v. Magazine Publishers of America, Inc.*, ___ S.E. 2d ___ (Fla. 1990).

In contrast to the Minnesota scheme, the Iowa structure does not create a special tax that applies only to certain publications protected by the first amendment, nor is it tailored in such a way that it singles out and targets small groups of publications. Iowa's tax is a generally-applicable retail sales tax whereby gross receipts from retail sales of tangible personal property are taxed. *See* Iowa Code § 422.43 (1977). In addition, in order to reach those retail sales that cannot be subjected to state sales tax, Iowa imposes a complimentary generally-applicable retail use tax whereby the use in Iowa of tangible personal property is taxed. *See* Iowa Code § 423.4(4)

(1977); *Dain Mfg. of Iowa v. Iowa State Tax Comm'n*, 237 Iowa 531, 534, 22 N.W.2d 786, 788 (Iowa 1946). Thus, while there are a number of sales and use tax exemptions in Iowa, *see generally* Iowa Code section 422.43 (1977), most retail transactions involving tangible personal property for use or consumption in the state of Iowa are taxed. *See Lee Enters., Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 754-55 (Iowa 1969) (holding that Iowa sales and use tax law, as amended, is of general application). The only deviation from this general scheme of taxation is that "newspapers" and "shoppers guides" are granted an exemption from the tax, while other publications are not. And since the tax does not target any small groups of publishers, either directly or indirectly, the tax satisfies the standards set by *Minneapolis Star*.

The issue of selective taxation of publications was once again addressed in *Arkansas Writers' Project*, where the Court examined an Arkansas sales tax scheme which taxed general interest magazines, but exempted newspapers and "religious, professional, trade and sports journals . . . " *Id.*, 481 U.S. 224, 107 S. Ct. at 1724. The net effect of the Arkansas tax scheme was that only a few Arkansas magazines would ever pay any sales tax.

The Court again placed great emphasis on the potential for abuse by the state if it was to recognize a power to tax selected members of the press. *Id.* at 228, 107 S. Ct. at 1727. The Court also found that both types of discrimination identified in *Minneapolis Star* could be established even where there is no evidence of an improper censorial motive, *Minneapolis Star*, 460 U.S. at 592, 103 S. Ct. at 1375, "because selective taxation of the press – either singling out the press as a whole or targeting individual

members of the press – poses a particular danger of abuse by the State," *Arkansas Writers' Project*, 481 U.S. at 228, 107 S. Ct. at 1727. Because the Arkansas sales tax scheme treated some magazines less favorably than others, it suffered from the second type of discrimination identified by the Court in *Minneapolis Star*. Additionally, the *Arkansas Writers' Project* case involves a much more distressing use of selective taxation than *Minneapolis Star* because the basis upon which the state differentiated between the different magazines is particularly repugnant to first amendment principles: namely, that a magazine's tax status depended entirely upon its content. *Id.* The Court also noted that this scheme completely contradicts the strictures of the first amendment which, "above all else, . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972)). "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 1728.

Relying on *Arkansas Writers' Project*, Hearst would have this court believe that Iowa Code section 422.45(9) (1977), which exempts "newspapers" and not "magazines" or "periodicals" from Iowa's sales and use taxation scheme, is facially invalid because the exemption, in substance, is based upon the content of a publication, rather than other facially valid noncontent criteria. We find little merit to this argument.

The facts of the case before us are markedly different from those in *Arkansas Writers' Project*. While the

classification of the writing as "news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest" is a consideration, the focus is not on the content of the journalism. Rather, the form and frequency of the publication are the primary factors for determining whether a publication qualifies for the Iowa sales and use tax exemption. Hearst, or anyone else for that matter, is free under the rule to publish and sell whatever content they choose and to choose whatever form they desire. The Iowa law does not scrutinize the content, but rather the form and frequency of publication. There is no censorial threat, motive, or element imposed by the rules in this case. Because the form of a publication is a noncontent based consideration, the Iowa statute complies with the standards set forth by the Supreme Court in *Arkansas Writers' Project*.

The Iowa tax scheme finds further support in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), where the Supreme Court upheld the denial of a tax exemption for a nonprofit organization engaged in lobbying activities even though veterans' organizations that lobbied on legislation received the exemption. In upholding this differential treatment of taxpayers, based solely upon whether or not a particular taxpayer chose to exercise his freedom of speech, the court noted that "tax exemptions and tax deductibility are a form of *subsidy* that is administered through the tax system," *Id.* at 544, 103 S. Ct. at 2000 (emphasis added) (reaffirming that legislative tax classifications may be broad and that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). *Id.* at 547, 103 S. Ct. at 2002.

The legislative classification in Iowa that distinguishes between "newspapers" and "magazines" or "periodicals" is supported by *Regan* wherein the Court stated that:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Regan, 461 U.S. at 547, 103 S. Ct. at 2002 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S. Ct. 406, 407-08, 84 L. Ed. 2d 590 (1940) (footnotes omitted)). While the government may not deny a benefit to an organization which decides to exercise its constitutional rights, the government is not required to subsidize those constitutional rights exercised. *Id.* at 545, 103 S. Ct. at 2001. We agree

with the district court in concluding that the Iowa Legislature may subsidize one form of publication (*i.e.*, "newspapers"), but is not required by the first amendment to also subsidize other forms of publications as long as it has a rational noncontent basis for doing so. Furthermore, because the Iowa law does not discriminate between media sources of the same type which would subject only a handful of publications to the state sales and use tax as in *Minneapolis Star* and *Arkansas Writers' Project*, and because the Iowa exemption is not impermissibly directed at a publication's content, as in *Arkansas Writers' Project*, the Iowa tax scheme which exempts "newspapers," but not "magazines" or "periodicals," from the generally-applicable Iowa retail sales and use tax is not the type of suspect tax that violates the first amendment. The decision of the district court is therefore affirmed on this ground.

B. Equal Protection of the Law.

The Fourteenth Amendment to the Constitution of the United States provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV. Section 6 of article 1 of the Iowa Constitution places substantially the same limitations upon the state legislation as does the equal protection clause of the fourteenth amendment. *See* Iowa Const. art. I, § 6; *see also City of Waterloo v. Selden*, 251 N.W.2d 506, 509 (Iowa 1977).

Our first step in analyzing the equal protection question is to determine whether a rational basis test or a more stringent standard should be applied. *Rudolph v.*

Iowa Methodist Medical Center, 293 N.W.2d 550, 557 (Iowa 1980).

Hearst contends that because it is being deprived of equal protection of the law under the Iowa statutes, and because its first amendment rights are being infringed upon, the classifications are subject to strict judicial scrutiny. An example of the application of this standard is *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, ___, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652 (1990), where the Court considered a Michigan statute which prohibited a nonprofit corporation from using its general treasury funds to support a political candidate. Even under strict scrutiny the Court held the equal protection clause was not violated.

Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547, 103 S. Ct. at 2001. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right such as freedom of speech or the press. *Id.* at 547, 103 S. Ct. at 2001-02. However, in tax matters even more than in other fields, the legislature possesses the greatest freedom in classification. *Id.*, 103 S. Ct. at 2002; *Dickinson v. Porter*, 35 N.W.2d 66, 72 (Iowa 1948), *appeal dismissed*, 338 U.S. 843, 70 S. Ct. 88, 94 L. Ed. 2d 515 (1949).

The situation in the present case, though factually distinguishable, closely parallels the situation in *Regan* on a doctrinal level as applied to this issue. The Iowa Legislature, through its state tax provisions, has chosen to subsidize newspapers and shoppers guides and no other forms of publication. This is similar to the subsidy

granted veterans' organizations in *Regan*. In treating the tax exemption as a form of subsidy, the *Regan* Court stated that:

> The Court of Appeals nonetheless held that "strict scrutiny" is required because the statute "*affect[s]* First Amendment rights on a discriminatory basis." 219 U.S. App. D.C., at 130, 676 F.2d, at 728 (emphasis supplied). Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. *This is not the law.* Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combating teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Id., 461 U.S. at 548-49, 103 S. Ct. at 2002 (emphasis added).

In finding that strict scrutiny did not apply, the *Regan* Court specifically stated that "[t]hese are scarcely novel principles. We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549, 103 S. Ct. at 2003. The constitution does not require that the government remove all obstacles in the path of the exercise of a person's rights. *Id.* at 549, 1013 S. Ct. at 2003. Where governmental

subsidies are not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is necessarily far broader. *Id.* at 550, 103 S. Ct. at 2003.

In both *Regan* and the case at bar, the legislature has chosen to subsidize one group's rights while not subsidizing the other. And since, as previously discussed, we found no suppression of Hearst's fundamental rights, strict scrutiny does not apply. The law in Iowa is that a challenged classification will not be subject to strict scrutiny unless it impinges upon a fundamental right or disadvantages an inherently-suspect class. *State v. Wehde*, 258 N.W.2d 347, 352 (Iowa 1977). Consequently, we apply a rational basis standard in deciding whether Iowa's statutory scheme of taxation in fact violates Hearst's guaranteed right to equal protection.

Under a rational basis standard, a legislative classification will survive judicial scrutiny if it bears a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547, 103 S. Ct. at 2001; *Veach v. Iowa Dep't of Transp.*, 374 N.W.2d 248, 249 (Iowa 1985). The rational basis standard is easily met in challenges to tax statutes. *Klein v. Iowa Dep't of Revenue & Fin.*, 451 N.W.2d 837 (Iowa 1990). In the case before us the department has presented sufficient evidence to persuade this court that the legislative classification at issue serves legitimate state interests.

The department asserts two state interests that are furthered by the Iowa tax scheme which we consider to be legitimate. First, is the interest the State has in encouraging the reading of newspapers and thereby enhancing the general knowledge and literacy of its citizenry. By

subsidizing the price of newspapers through the "newspaper" exemption the State makes newspapers available to those of even moderate to low means; an action deemed to be in the public interest. With this exemption, newspapers will remain an inexpensive source of public information which most people will be able to afford.

Secondly, the State has a legitimate interest in maintaining administrative economy. The majority of sales and collections on the sale of newspapers are made by child carriers. It would be uneconomical and highly impractical if the tax department was forced to monitor, regulate and audit the hundreds of carriers who sell and collect for newspapers on a daily and/or weekly basis. To expect these child carriers, the majority of whom are between the ages of ten and twelve, to correctly figure, collect, and remit the proper amount of tax due is ludicrous. We find that the legislature was reasonable in concluding that the state interest would be better served by exempting these particular sales.

Hearst further contends that the "newspaper" exemption is fatally over-broad and that if the problem is carrier sales, the Iowa tax exemption should have been narrowly tailored to only deal with that specific problem. We find little merit in this contention. Hearst's argument is not compatible with the *Regan* decision and, even assuming that it is, the resulting statutory exemption would cause the differential taxation of same source media as condemned by the Supreme Court in both *Minneapolis Star* and *Arkansas Writers' Project*. Uniform treatment of same source media advances the principles and standards set out by the Supreme Court in *Minneapolis*

Star and *Arkansas Writers' Project* and forestalls any content discrimination claims by members of the same media.

We agree with the department that there is no iron-clad "all or nothing" rule for the taxation, or exemption from taxation, of speech to be found in the constitution. Such a rule has been espoused in several state court cases but without reasoned analysis. *See Jones & Co. v. State Ex Rel. Tax Comm'n*, 787 P.2d 843 (Okla. 1990); *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900 (La. App. 1 Cir. 1987). Furthermore, it was not embraced by the Supreme Court in *Arkansas Writers' Project* and is inconsistent with *Regan*. We find that the rational basis standard is the proper constitutional test to be applied in this case, and because the Iowa tax law satisfies that standard, Hearst's equal protection claim must be rejected.

C. Due Process of Law.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law;". Section 9 of article I of the Iowa Constitution similarly provides.

All of the provisions of the First Amendment to the Constitution of the United States have been made applicable to the several states through the Fourteenth Amendment, including freedom of speech and of the press. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630, 69 L. Ed. 1138 (1925). Hearst contends that if it is not being deprived of its fundamental rights under the first amendment, Iowa Code section 422.45(9)(1977) is so

vague, indefinite, and uncertain that it cannot be determined by generally-acceptable rules of construction what publications qualify for the exemption within the parameters of that section.

The Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause when its language does not convey a sufficiently definite warning as to proscribed conduct when measured by common understanding or practice. *Arnett v. Kennedy*, 416 U.S. 134, 158-64, 94 S. Ct. 1633, 1646-47, 40 L. Ed. 2d 15 (1974). However, a noncriminal statute is not unconstitutionally vague where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its proscriptions. *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S. Ct. 2908, 2913, 37 L. Ed. 2d 830 (1973). Only when persons must necessarily guess at the meaning of a statute and differ as to its application must it be declared invalid. *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). The root of the vagueness doctrine is a rough idea of fairness. *Colton v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L. Ed. 2d 584 (1972).

When confronted with vagueness challenges we have pointed out that a statute meets the constitutional test if its meaning is fairly ascertainable by reference to similar statutes, other judicial determinations, and to the dictionary, or if the words themselves have a common and generally-accepted meaning. *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 772 (Iowa 1971). Even if more specific language could be devised, it is apparent that, in the absence of criminal sanctions a statute requires less literal exactitude to comport with due process; unless the

statute clearly, palpably, and without doubt infringes the constitution it will be upheld. *Lee Enter., Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 739 (Iowa 1969).

Both on its face and as applied to the facts in this case, the term "newspaper" passes constitutional muster. Hearst itself has classified, for public consumption, its various publications as either "newspapers" or "magazines." We also find that even before the department formally adopted a definition for the term "newspaper" on January 28, 1981, the meanings of the terms of the statute were sufficiently clear that Hearst could have fulfilled it prescriptions. The Department was correct in finding that the term "newspaper" as used in Iowa Code section 422.45(9)(1977) is not so vague, indefinite, and uncertain, as to deprive Hearst of its liberty or property interests without due process of law.

D. The Commerce Clause.

Article I section 8 clause 3 to the Constitution to the United States provides that "The Congress shall have the power . . . to regulate commerce . . . among the several states . . . . " However, state legislation designed to serve legitimate state interests and applied without discriminating against interstate commerce does not violate the commerce clause even though it may affect interstate commerce. *Consolidated Freightways Corp. of Delaware v. Kassel*, 475 F. Supp. 544, 547 (S.D. Iowa 1979), *aff'd*, 612 F.2d 1064, probable jurisdiction noted 446 U.S. 950, 100 S. Ct. 2915, *aff'd*, 450 U.S. 662, 101 S. Ct. 1309, *cert. dismissed*, 455 U.S. 329, 102 S. Ct. 1496.

Hearst contends that under the commerce clause the practical effect of the Iowa Code section 422.45(9)(1977) "newspaper" exemption is to discriminate in favor of local (Iowa) print media and against foreign (non-Iowa) source print media. This results in discrimination against interstate commerce in favor of local commerce in the fight for the subscriber dollar. The district court found no merit to this argument and neither do we.

The Supreme Court stated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S. Ct. 599, 607, 50 L. Ed. 2d 514 (1977) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 362, 3 L. Ed. 2d 421 (1959)), that "[n]o state, consistent with the commerce clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." However, the Court has repeatedly held that the commerce clause is not violated when state taxation affects a particular classification, as long as the class distinctions are not based on any in-state or out-of-state criteria. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 101 S. Ct. 2946, 2953, 69 L. Ed. 2d 884 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, 98 S. Ct. 2207, 2214, 57 L. Ed. 2d 91 (1978); *Morman Mfg. Co. v. Blair*, 437 U.S. 267, 277, 98 S. Ct. 2340, 2346, 57 L. Ed. 2d 197 (1978) (n.12); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049, 3056, 82 L. Ed. 2d 200 (1984), where an illegal discrimination favoring local industries was found.

The Iowa tax scheme does not base the "newspaper" exemption upon any in-state or out-of-state criteria. It is

the form of the publication, not the source of the commerce, that determines taxation or exemption under the Iowa tax law. Newspapers will be exempted whether published in the State of Iowa or outside the state. In this regard, any of the Hearst Corporation's "newspapers," whether published outside the state and sold within the state or published within the state and sold outside the state, will qualify for the tax exemption. Likewise, all of the Hearst Corporation's "magazines" or "periodicals," whether published within the state and sold outside the state or published outside the state and sold within the state, will be subjected to the Iowa tax. The tax is not aimed at interstate commerce as such. It applies to all taxpayers for services rendered within the state.

There has been no showing that the "newspaper" tax exemption is at all based on the protection of local business, or that the tax on magazines places an undue burden on interstate commerce. *Lee Enters. Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 743-52 (Iowa 1968). Hearst's commerce clause claim is therefore rejected.

V. Recovery of Attorneys Fees.

Hearst argues that because it has raised constitutional claims that it is entitled to recover its reasonable attorneys' fees in this matter pursuant to 42 U.S. Code sections 1983 and 1988. 42 U.S. Code section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

> the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 1988 provides in relevant part that:

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

Hearst relies upon these sections and the case of *Blessum v. Howard County Board of Supervisors*, 295 N.W.2d 836 (Iowa 1980), to persuade us that Iowa courts have accepted jurisdiction over section 1983 claims and have entertained those claims brought under that section. *Id.* at 846. Hearst's reliance on this case is misplaced. The *Blessum* case, unlike the present case, was a suit against a county government, did not involve the state or one of its departments, and did not involve a claim regarding the assessment and collection of taxes. Therefore, we find this case totally irrelevant to the present situation.

We are not here faced with a 42 U.S. Code section 1983 action. This case involves judicial review, pursuant to Iowa Code section 422.55 (1977), of a contested case based on an administrative hearing authorized by Iowa Code sections 423.16 and 422.54(2)(1977). None of these statutes authorize, nor do they even mention, the recovery of a reasonable attorneys' fee. As a matter of fact, 42

U.S. Code section 1988 specifically states that a reasonable attorneys' fee will only be awarded to the prevailing party. Since Hearst is not the prevailing party it is not entitled to the award of a reasonable attorneys' fee. We also note that our State Tort Claims Act, section 25A.14(2), 1989 Code, does not apply to authorize any claim arising in respect to the assessment or collection or any tax or fee. Therefore, the decision of the district court is affirmed on this issue.

VI. The Penalty for Failure to Collect and Remit the Use Tax due.

Iowa Code section 423.18(1)(1977) provides for the assessment of a penalty for failure to timely collect and remit use tax due unless it can be shown that failure to remit the tax on or before the date due was due to "reasonable cause." *Atlantic Bottling Co. v. Iowa Dep't of Revenue*, 385 N.W.2d 565, 569 (Iowa 1986); *Armstrong v. Iowa Dep't of Revenue*, 320 N.W.2d 623, 629 (Iowa 1982).

A taxpayer may establish "reasonable cause," as that term is used in our tax penalty statutes, by establishing that it did all that ordinary business care and prudence would demand. *Armstrong*, 320 N.W.2d at 629. What constitutes "ordinary business care and prudence" is a determination to be made on the facts of each particular case. *Id.* The burden is on the taxpayer, however, to establish reasonable cause by a preponderance of the evidence. *Atlantic Bottling Co.*, 385 N.W.2d at 569. Because the department found that Hearst had not met its burden of proof, we will overturn the department on this issue only

if Hearst established reasonable cause as a matter of law. *Id.*

The record does not establish that Hearst's failure to collect and remit the use tax was in any way consistent with ordinary business care and prudence. The only rationale offered by Hearst as a reason for failing to collect and remit the use tax, was that in its opinion the tax was discriminatory and in violation of the Constitution.

Hearst did not notify the department that it considered the tax to be unconstitutional as applied to the sale of its magazines. It did not seek a declaratory ruling as to the validity of the tax, nor did it remit the tax and subsequently seek a refund based upon the invalidity of the statute. Hearst merely presented its unsupported opinion that the law was unconstitutional. Hearst raised its constitutional objections as a defense to the tax assessment for the first time only after the department had audited Hearst. Ordinary business care and prudence require that the taxpayer follow the law. Consequently, Hearst has not established reasonable cause in this case.

The district court's decision is affirmed.

AFFIRMED.

No. 90-273

In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.; and PROGRESSIVE FARMER, INC.,

Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY THE STATE OF IOWA, AND THE STATES OF AMERICAN SAMOA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory states submit this Brief as Amici Curiae in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 37.5.

II. OPINION BELOW

The Opinions of the Tennessee Supreme Court are reported in 789 S.W.2d 247 and 789 S.W.2d 251 (1990). The unreported Opinions of April 22, 1988 and of June 1, 1988 of the Chancery Court, 20th Judicial District, are contained in the Appendix attached to Petitioner's Petition for Writ of Certiorari.

III. INTEREST OF AMICI CURIAE

The signatory Amici states are deeply concerned with what they believe to be the far-reaching implications which flow from the Tennessee Supreme Court's decision in this case relating to a generally applicable state tax structure. In this regard, Tennessee's tax uniformly exempts all newspapers and uniformly taxes a wide variety of other publications sold at retail.

Amici strongly believe that a state should not be precluded by First Amendment guarantees from making reasonable choices of distinct types of publications, particularly newspapers, as subjects for tax exemption and,

having made that choice, should not be required to exempt all other publications, printed matter, or media. The Tennessee Supreme Court's decision negates that choice and its "all or nothing" approach requires that all speech be tax exempt if any of it is or, put another way, all speech be taxed if any of it is. Amici do not believe such a result to be the law and, indeed, believe that the decision is in conflict with prior and subsequent precedent of this Court. Moreover, that result does not enhance First Amendment guarantees and merely pressures state legislatures to tax all speech.

Most states impose sales and use taxes of general applicability. Virtually all of the states have some tax exemptions which implicate speech that have First Amendment protections and, also, impose such taxes upon retail sales of tangible personal property in general that will include publications or printed materials sold which are distinct from those entitled to a tax exemption. Also, state tax structures do not have ironclad identical tax treatment of all types of speech. It is important that this Court provide direction to states and taxpayers with respect to differential tax treatment of distinct speech.

IV. ARGUMENT

Tennessee, in common with most states in the Nation, imposes a generally applicable retail sales and use tax scheme. While most retail sales are subject to tax, T.C.A. § 67-6-329(a)(3) provides a tax exemption for all newspapers. Other types of publications, including magazines,

are subject to tax. The Tennessee Supreme Court essentially adopted an "all or nothing" approach whereby the tax exemption for newspapers dictates a corresponding exemption for all other publications. Under the rationale adopted by the Tennessee Court, it would be impossible for a state to tax publications and printed matter, such as books, greeting cards, and law briefs, even within the context of a generally applicable tax law, if the state exempted newspapers. In addition, this approach suggests that, within such context, all speech (printed or otherwise) must receive uniform state tax treatment.

State courts have issued conflicting decisions with respect to differential tax treatment of speech. Some state courts have adhered to Tennessee's "all or nothing" approach. In *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1987), a Louisiana Appellate Court invalidated the Louisiana sales tax that exempted newspapers but not magazines. In *Department of Revenue v. Magazine Publishers of America, Inc.*, 1990 Fla. Lexis 729 (May 31, 1990), the Florida Supreme Court also declared invalid a sales tax that exempted newspapers but not magazines. In *Dow Jones, Inc. v. Oklahoma*, 787 P.2d 843 (Okla. 1990), the Oklahoma Supreme Court invalidated a sales tax which exempted publications costing less than 75 cents and issued at least every three months or less, but not others, notwithstanding that this tax structure was not based upon content, did not single out the press for taxation, and did not result in only a handful of publications being taxed. In *McGraw-Hill, Inc. v. State Tax Commission*, 75 N.Y.2d 852, 552 N.E.2d 163 (1990), the New York Court of Appeals invalidated a New York net income apportionment system to the extent that it treated

print media different than broadcast media. In *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), the Oklahoma Supreme Court invalidated a sales tax to the extent that print media and broadcast media were treated differently. In this case, the Court opined that broadcaster's First Amendment rights were violated by a statute which allowed an industrial equipment and materials tax exemption for processing tangible personal property and which was available to manufacturers of print media because non-manufacturing broadcast media, under the law, did not receive any tax exemption for equipment and materials used in broadcast transmissions. These state court decisions are not consistent with the general rule that a statute which subsidizes some speech, but not all speech, is not inevitably subject to strict scrutiny. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

In contrast, the North Carolina Supreme Court upheld a state use tax which exempted street vendors and door-to-door sales of newspapers in *Matter of Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Corporation*, 312 N.C. 211, 322 S.E.2d 155 (1984), *app. dismissed*, 472 U.S. 1001 (1985). It is difficult to see how this Court's summary affirmance of the North Carolina Court's decision is consistent with the Tennessee Court's decision and with the other cases mentioned above. In *Redwood Empire Publishing Co. v. California State Board of Equalization*, 255 Cal. Rptr. 514 (Cal. App. 1989), the California Appellate Court upheld a sales tax upon an advertising publication even though the sales tax law exempted newspapers. In *Times Mirror Company v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr.

346 (1987), *app. dismissed*, 108 S.Ct. 743 (1988), the Court upheld a tax system in which a variety of businesses enjoying First Amendment protection had differential tax burdens. In *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), the Arkansas Supreme Court held that the First Amendment was violated by a sales tax imposed upon cable television sold to subscribers where no tax was imposed upon satellite television. However, the Court rejected an argument that cable television was entitled to tax exemption because newspapers and magazine sales were exempt. Petitions for Writs of Certiorari (Nos. 90-29 and 90-38) in *Medlock* are pending in this Court.

Accordingly, there is no uniformity among the state courts when confronted by a tax law which treats, for taxation, different types of media differently. Indeed, these courts are in hopeless conflict and this trend should continue in the absence of guidance from this Court. Since a substantial federal question is raised by the Tennessee Court's decision and since the state courts are issuing conflicting decisions and are struggling with this issue, this Court should grant Tennessee's Petition for Writ of Certiorari and give plenary consideration to this case.[1]

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[1] In addition to the state appellate decisions listed in the text, several trial courts have also considered the newspaper – magazine issue. In *The Hearst Corporation v. Iowa Department of Revenue and Finance*, No. AA-1401, Polk County District Court, November 6, 1989, an Iowa District Court upheld the Iowa sales and use tax law to the extent that it exempted all newspapers and shoppers guides from tax, but not magazines and

(Continued on following page)

Those state courts, including the Tennessee Court, which take the "all or nothing" approach toward uniform tax treatment of all speech rely upon this Court's decisions in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987). But, those cases did not directly address the questions presented in this case. In *Minneapolis Star*, a special state "use tax" upon newspaper components was invalidated for two reasons. First, the tax singled out the press for a special tax upon components not imposed upon other manufacturers of tangible personal property. Second, the

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other publications. This case is currently pending appeal in the Iowa Supreme Court and was submitted to that Court for decision on July 13, 1990. In *Merriken Publications, Inc. v. Comptroller of the Treasury*, 1989 Md. Tax Lexis 12, the Maryland Tax Court upheld the Maryland sales tax to the extent that it exempted all newspapers, but not the taxpayer's publication that listed real estate for sale in that state. The Maryland Tax Court properly observed:

> The exemption for newspapers is based on the unique historical role of newspapers. Newspapers have served and continue to serve the function of providing the public with a timely (in many cases daily), inexpensive, source of the news. The purpose of § 326(n) is not to unduly burden the production of other types of publications, but, instead to perpetuate the existence of timely, inexpensive newspapers. Given the unique historical role of newspapers and the state's interest in monitoring their existence, Petitioner fails to prove that the exemption for newspapers set forth in § 326(n) is not grounded upon a rational basis.

$4,000 tax credit left only a handful of publications subject to tax upon their components. Since Minnesota offered no justification for such selective taxation of the press, the "use tax" was invalidated. In *Arkansas Writers*, the Arkansas sales tax law exempted newspapers and sports, trade, professional, and religious publications, but not others. As applied to the taxpayer's general interest magazine, the tax was invalidated for two reasons. First, the effect of the exemption for sports, trade, religious, and professional publications was to leave only a few publications in the state subject to tax. Second, because the taxpayer also published some religious and sports articles in its magazine, the effect of the publication exemption was to create a discriminatory tax exemption based solely upon content. Since Arkansas offered no justification for such tax treatment, this Court invalidated it. Significantly, this Court declined to decide the very issue decided by the Tennessee Court and which Tennessee now presents in its Petition, namely, whether a tax exemption for newspapers, but not for other distinct publications, is valid. 481 U.S. at 233. Moreover, there is nothing in *Minneapolis Star* or in *Arkansas Writers* to suggest that this Court has deviated from the general rule that strict scrutiny is not per se applied whenever a state subsidizes or taxes some, but not all, speech.

Even though it is obvious that *Minneapolis Star* and *Arkansas Writers* did not directly address the issue in the instant case, the state courts which have taken the "all or nothing" approach have erroneously concluded that those cases did. Because that issue was left open by this

Court in *Arkansas Writers*, this Court should grant Tennessee's Petition for Writ of Certiorari and give plenary consideration to this case.[2]

Finally, it is not irrelevant to point out that states commonly have laws that confine publication of legal notices, proceedings, or other matter in "newspapers." For example, the Iowa Supreme Court requires notice to be served upon defendants who cannot be found by publication only in newspapers, in its rules of civil procedure. *See* Iowa R. Civ. P. 60-62. In addition, the federal government authorizes differential anti-trust treatment for newspapers. 15 U.S.C. §§ 1801-1804 and *see Austin v.*

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[2] The Tennessee Supreme Court dismissed this Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) as having "little or nothing to do with the abridgment of freedom of speech, or of the press contained in the First Amendment to the Constitution, which is the thrust of the complaint in this suit." This view of *Regan* is simply wrong. *Regan* is a First Amendment case. It recognizes tax exemptions as subsidies. It holds that the general rule is that a tax system that exempts some, but not all, speech is not inherently subject to strict scrutiny. 461 U.S. at 548. The state courts which insist on the "all or nothing" approach, including the Tennessee Court, have rendered decisions that are not consistent with *Regan*. Under *Regan*, states can subsidize all newspapers, and refuse to subsidize other publications, printed matter, or any other type of media. The Tennessee and other courts which have misapplied *Minneapolis Star* and *Arkansas Writers* have failed to appreciate or apply *Regan*. Tax exemptions are subsidies and a state's failure to exempt various media and speech is merely a refusal by the state to pay for it. Under *Regan*, the mere failure to exempt all speech does not invoke a strict scrutiny test that requires the state to justify the taxation of nonexempt speech and Amici believe that the Tennessee Court erred in applying that test in this case.

Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990); *Committee For An Independent P.I. v. Hearst Corporation*, 704 F.2d 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983). The Tennessee and other state courts' "all or nothing" approach to taxation casts doubt on the validity of these state and federal laws. Therefore, the ramifications of the Tennessee decision transcend the tax issue in this case. These ramifications are far-reaching, affect many if not all of the states and the federal government, and justify this Court's granting of Tennessee's Petition and the giving of plenary consideration to this case.

V. CONCLUSION

Tennessee's Petition raises matters of vital concern to the Amici states and presents important questions which this Court has not directly addressed. Therefore, we urge this Court to grant Tennessee's Petition for a Writ of Certiorari and to give plenary consideration to the matter.

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No. 90-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
AND PROGRESSIVE FARMER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENTS' SUPPLEMENTAL BRIEF

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RESPONDENTS' SUPPLEMENTAL BRIEF

INTRODUCTION

After respondents[1] submitted their briefs in opposition, the Iowa Supreme Court issued its decision in *Hearst Corp.* v. *Iowa Dept. of Revenue and Finance*, No. 268/89-1863 (Iowa, Sept. 19, 1990).[2] In his reply brief, petitioner characterizes the Iowa decision as one in direct conflict with the instant Tennessee decisions which compels the granting of the petition in this case. Respondents submit this supplemental brief, pursuant to Rule 15.7 of this Court's rules, to address the Iowa decision and the misreliance placed upon it by petitioner in his reply brief.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE IOWA SUPREME COURT IN *HEARST* AND THE DECISIONS OF THE TENNESSEE SUPREME COURT IN THE PRESENT CASES.

[1] The statements required by Rule 29.1 of this Court's rules are set forth in respondents' respective briefs in opposition: "Brief in Opposition of Newsweek, Inc.," at i; "Brief in Opposition of Respondents, Southern Living, Inc. and Progressive Farmer, Inc.," at ii.

[2] The decision is reproduced as the Appendix to petitioner's "Reply to Briefs in Opposition," and is cited as "Reply App. at ."

There is a fundamental, outcome-determinative difference between the decisions of the Court below and the *Hearst* decision. The Court below found, as it was compelled to do both from the face of the applicable Tennessee regulations and from the undisputed facts in the record before it, that Tennessee's tax scheme, which exempts "newspapers" but not magazines, involved content-based discrimination.[3] Content-based discrimination, absent a compelling state interest, is unconstitutional. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987).

In contrast, the court in *Hearst* found that "the form and frequency of the publication are the primary factors for determining whether a publication qualifies for the Iowa sales and use tax exemption." (Reply App. at 16)[4] The *Hearst* court went on to find that "[t]he Iowa law does not scrutinize the content. . . ." "Because the form of publication is a noncontent-based consideration, the Iowa statute complies with the standards set forth by the Supreme Court in *Arkansas Writers' Project.*" (Reply App. at 16)

Thus, the different results in these decisions from two different states flow from differences in the kind of tax discrimination under examination.

Ignoring the stark differences between the two decisions, petitioner nevertheless asserts that "[t]he court of last resort of the State of Iowa has decided precisely the issue presented by the petitioner here in a way that directly conflicts with the Tennessee Supreme Court's decisions in these cases." (Reply at 1) When the different circumstances of the cases are properly taken into account, it is clear that there is no conflict—direct or otherwise.

Petitioner's attempt to conjure up a conflict not only ignores the important differences in the Iowa and Tennessee decisions, but also ignores the underlying differences in the tax schemes of the two states.

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[3] Nowhere in its petition did petitioner challenge this finding.

[4] The record before the Tennessee courts expressly negates any reliance by petitioner upon either form or frequency in making his determination of which publications are newspapers.

The Iowa statute, on its face, is content-neutral. (Reply App. at 6-7) More importantly for this proceeding, Iowa had no regulatory definition of the term "newspaper" for much of the audit period.[5] The Iowa court was obligated to define the statutory term "newspaper" for a period when neither the court nor a taxpayer could resort to a regulatory definition.

Petitioner here observes that the Tennessee tax statute is also content-neutral (Reply at 7) and concludes without more that the Iowa and Tennessee decisions are therefore in direct conflict. This conclusion ignores the fact that Tennessee, unlike Iowa, had a tax rule defining "newspaper" which was applicable for the entire period and which included a content-based component.

Petitioner chastises the Tennessee Supreme Court for its failure to be guided by common usage. Citing the discussion in *Hearst* of the common usage of the term "newspaper," petitioner warns that "if the term 'newspaper' were construed as being inherently content-based, and thus constitutionally suspect, the validity of numerous other laws... would be called into serious question." (Reply at 6).

The Tennessee Supreme Court was not called upon to "construe" the term "newspaper." The Tennessee Supreme Court was required to do what those potentially subject to the tax must do—read the regulatory definition of "newspaper." It observed that exemption from the tax depends upon the content of the publication. Were "common" usage alone a sufficient guide, the Tennessee tax authorities doubtless would have found it unnecessary to *define* the term "newspaper" in their regulations.[6]

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[5] The audit period is October 1, 1978 through December 31, 1982. (Reply App. at 3) "Newspaper" was not defined by Iowa tax rules until January 28, 1981. (Reply App. at 7)

[6] Whether, in the absence of a definition provided by the state, a court might construe the term "newspaper" as "inherently content based" is irrelevant to the present case. See Reply at 6. Nevertheless, the Tennessee Supreme Court has held that the Tennessee regulatory definition, including its content-based requirement, is "in accord with the generally accepted usage of the term 'newspaper.' " *Shoppers Guide Publishing Co.* v. *Woods*, 547 S.W.2d 561, 563 (Tenn. 1977).

Whether the Iowa Supreme Court arguably has addressed the issue reserved by this Court in *Arkansas Writers'*—"whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." 481 U.S. at 233—does not provide any basis for granting the instant petition. Properly, the Tennessee Supreme Court did not address that issue since, on the facts before it, *Arkansas Writers'* was clearly controlling. This petition is an inappropriate vehicle by which to review the Iowa decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondents' briefs in opposition, the petition for a writ of certiorari should be denied.

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